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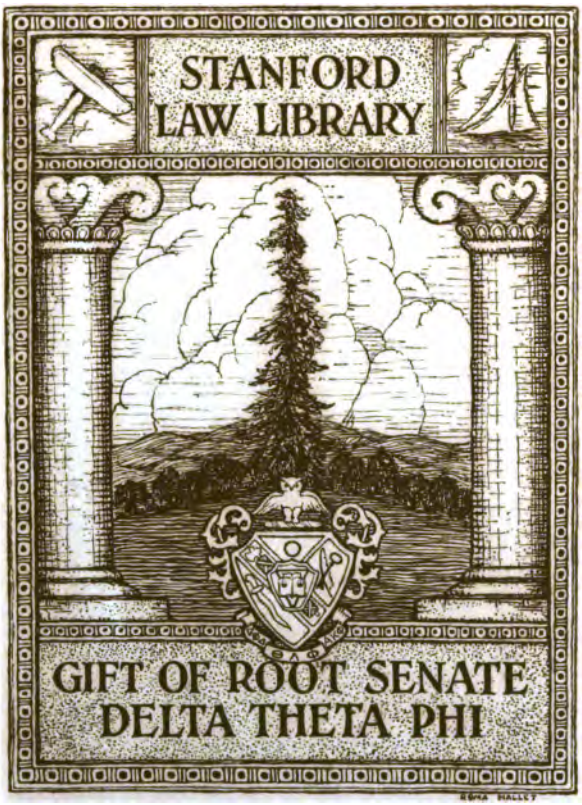
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THE

MARITIME LAW

OF

EUROPE.

THE

MARITIME LAW

OF

EUROPE.

BY M. D. A. AZUNI,

LATE SENATOR AND JUDGE IN THE COMMERCIAL AND MARITIME COURT OF NICE, MEMBER OF THE ACADEMIES OF SCIENCES, AT TURIN, NAPLES, FLORENCE, MODENA, ALEXANDRIA, CARARA, ROME, AND TRIESTE;

MEMBER OF THE ATHENEUM OF ARTS, AND OF THE ACADEMY OF LEGISLATION, AT PARIS, AND OF THE ACADEMY OF ARTS AND SCIENCES, AT MARSEILLES.

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Quid deceat, quid non; quò virtus, quò ferat error.
HOR. *de Art. Poet.*

IN TWO VOLUMES.

TRANSLATED FROM THE FRENCH.

VOL II.

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BE IT REMEMBERED, That on the twelfth day of April, in the thirtieth year of the Independence of the United States of America, WILLIAM JOHNSON, of the said District, hath deposited (L.S.) in this office the Title of a Book, the right whereof he claims, as author, in the words following, to wit:

"THE MARITIME LAW OF EUROPE,

BY M. D. A. AZUNI,

Late Senator and Judge, in the Commercial and Marithme Court of Nice, Member of the Academies of Sciences at Turin, Naples, Florence, Modena, Alexandria, Carara, Rome, and Trieste; Member of the Atheneum of Arts, and of the Academy of Legislation, at Paris, and of the Academy of Arts and Sciences, at Marseilles.

Quid deceat, quid non; quò virtus, quò ferat error.

HOR. *de Art. Poet.*

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THE

MARITIME LAW OF EUROPE.

PART SECOND.

Of the Maritime Law of Europe in time of War.

CHAPTER I.

OF THE RIGHTS OF BELLIGERENT AND NEUTRAL NATIONS.

ARTICLE I.

Of the Origin and Causes of Maritime Wars.

§ 1. THE sole aim of man, from the first moment of his existence, is the pursuit of pleasure, or the avoidance of pain, by every means which may bring him nearer to the one, or remove him further from the other. A being harmonious, composed of fibres, alive to each impression, and susceptible of every emotion, his heart is torn with grief, or exhilarated with pleasure. His happiness constitutes the sole object of his unceasing care: it becomes the ruling

bosom of the mother affords nourishment to the first wants of her offspring, and the vigorous arm of the father procures subsistence and support for their adolescent state.(2)

4. By the frequent intercourse of the sexes, domestic population is increased; by the use of property, and the necessity of labour, individuals are multiplied; wants augment with numbers; a single family becomes the nursery of many others, which extending one after another, until no longer able to live

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extraneam. Itaque viro calores et frigora perpetienda, tum etiam itinera et labores pacis ac belli, id est, rusticationis et militarium stipendiorum, distribuit; mulieri deinceps, quòd omnibus his rebus fecerat inhabilem, domestica negotia curanda tradidit. Et quoniam hunc sexum custodiæ et diligentiæ assignaverat, idcirco timidiorem reddidit, quàm virilem: nam metus plurimùm confert ad diligentiam custodiendi. Quòd autem necesse erat foris et in aperto victum quærentibus nonnunquam injuriam propulsare, idcirco virum, quàm mulierem, fecit audaciorem. Quia verò partis opibus æquè fuit opus memoriâ, et diligentiâ; non minorem feminæ, quàm viro, earum rerum tribuit possessionem. Tum etiam, quòd simplex natura non omnes res commodas amplecti volebat, idcirco alterum alterius indigere voluit; quoniam, quod alteri deest, præstó plerumque est alteri. This differs widely from the system of some modern female philosophers....T.

(2) *Commune item animantium omnium est conjunctionis appetitus, procreandi causa, et cura quædam eorum, quæ procreata sunt. Sed inter hominem et belluam hoc maxime interest, quod hæc tantum, quantum sensu movetur, ad id solum, quod adest, quodque presens est, se accommodat, paululum admodum sentiens præteritum aut futurum. Homo autem ..... facile totius vitæ cursum videt, ad eamque degendam præparat res necessarias.* Cic. *de Offic.* lib. 1, cap. 4.

under the same roof, they are compelled to separate, in search of new habitations, from which are successively formed hamlets, towns, and nations.* This separation of families was not the effect of that repulsive feeling which impelled men to hate, and avoid each other. The extravagance of some pretended philosophers,† has, in vain, endeavoured to trace this

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* *Eadem natura vi rationis hominem conciliat homini, et ad orationis et ad vitæ societatem; ingeneratque in primis præcipuum quemdem amorem in eos qui procreati sunt; impellitque ut hominum cœtus celebrari inter se, et a se obiri velit; ob easque causas studeat parare ea, quæ suppeditent, et ad cultum, et ad victum; nec sibi soli, sed conjugi, liberis ceterisque, quos caros habeat tuerique debeat: quæ cura exsuscitat etiam animos, et majores ad rem gerendam facit.* Cicero, *de Officiis*, lib. 1, cap. 4....T.

† *Hobbes* appears to have been the first among the modern philosophers, who supposed a state of nature to be a state of war. Cicero, in his Oration *pro P. Sextio*, cap. 42, seems to consider this as a theory generally received in his time. *Quis enim vestrum, judices, ignorant, ita naturam rerum tulisse, ut quodam tempore homines, nondum neque naturali, neque civile jure descripto, fusi per agros ac dispersi vagarentur tantumque haberent quantum manu ac viribus, per cædem ac vulnera, aut eripere aut retinere potuissent.* This is the imaginary state of man, antecedent to the formation of any society, even of a domestic nature, when men, according to Lucretius, (lib. v. l. 951,) wandered naked in the woods, and sought shelter from storms, in caves and rocks.

Nec commune bonum poterent spectare; nec ullis
Moribus inter se scibant, nec legibus uti.
Quod cuique obtulerat, prædæ fortuna, ferebat
Sponte sua, sibi quisque valere, et vivere doctus.

The immediate and powerful effects of connubial ties, and a fixed habitation, on the manners of men, in rendering them sensible of the benefits of law and government, are well described by both these writers....T.

odious, and malignant principle in the first impressions of nature. It is only on particular occasions, when opposite interests excite jealousy and rivalship, that it insinuates itself into the human heart.

5. The first war which disturbed the repose of mankind, must have been the encounter of hunting tribes, equally covetous and jealous of the possession of grounds the most frequented by wild beasts. Hordes, long exercised in the arts of extermination, with arms in their hands, and ferocity in their hearts, would soon proceed from the destruction of animals to that of men. Interest excited to the combat, victory terminated the conflict, the field of battle remained in possession of the strongest, and the hunting ground became the first conquest. As soon as they had made the unfortunate discovery of the effects of superior strength, interest and passion seduced the most hardy to repeat the example. Such appears to me to be the true origin of war; the first time when men became cruel, and homicides.

6. Cupidity, avarice, ambition, pride, fanaticism, cruelty, much more than the interests of nations, wisely consulted, have originated and established the rights of war;(3) rights, the destructive exercise of

(3) Wars do not arise among mankind from a principle of extermination. Some proceed from the love of pleasure, some from avarice, others are kindled by the excess of ambition, and a thirst for fame and empire. *Plutarch*, vol. 2, p. 1049, ed. Wech. *Ex*

which, has so often covered the earth with blood and devastation; fatal rights, rendered indispensible by those passions which persuade the leaders of nations, that their own happiness depends on the ruin of others.(4) Since the adoption of this unhappy prejudice, the art of war has gained an entire assendancy over the productive arts, and such as conduce to the preservation and improvement of life. In every nation arsenals are erected, and filled with arms. What do I say? All Europe, at the present day, is one vast arsenal, in which all the instruments of human destruction are heaped together with the utmost care.(5) Machines the most murderous are

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cupiditatibus, odia, dissidia, discordiæ, seditiones, bella nascuntur. Cicero, *de Finibus,* lib. 1, cap. 13. Diogenes Laertius quotes the following fine distich of the philosopher Athenæus, lib. 10, § 2.

In malo sudatis miseri; sine fine cupido
Vos agit in rixas bellaque præcipites.

(4) On this subject, *Horace* thus elegantly expresses himself:

Quidquid delirant reges plectuntur Achivi:
Seditione, dolis, scelere, atque libidine et ira,
Iliacos intra muros peccatur et extra.

Hor. lib. 1. epis. 2.

(5) "A new malady," says Montesquieu, "has spread itself over Europe. It has infected princes, and induces them to maintain an exorbitant number of troops. It has its paroxysms, which of necessity are contagious; for as soon as one state augments its troops, the others do the same, so that nothing is gained by it, but general ruin. Each monarch keeps on foot the same armies which he would have, if his people were in danger of extermination. This

the best received: the inventor of the means of exterminating a whole nation, at a single stroke, would, at the present day, be esteemed a great man, and far superior to him who should discover the means of increasing the human race, or securing the happiness and repose of the world.(6)*

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state of exertion of all against all is denominated *peace.*" Liv. 13, ch. 17.*

(6) "Quali sono i soli ogetti, che hanno fino a questi ultimi tempi occupati i sovrano d'Europa? Un arsenale formidabile, un artiglieria numerosa, una truppa bene agguerita. Tutti i calcoli, che si sono esaminati alla presenza de' principi, non sono stati diretti, che alla soluzione d'un solo problema; trover la maniera d'uccidere piu hommi nel mino tempo possible." Filangieri, *Scienza della Legislazione,* Introd. p. 1.

Translation.—"What are the objects which have engaged the attention of the sovereigns of Europe in modern times? A formidable arsenal, a numerous train of artillery, well appointed armies. All the calculations made in the cabinets of sovereigns at the present day, are directed to the solution of one problem:—*in what way the greatest number of men, can be killed in the shortest possible time.*"

* To overcome in battle, and subdue
Nations, and bring home spoils with infinite
Man-slaughter, shall be held the highest pitch
Of human glory, and for glory done
Of triumph, to be styl'd great conquerors,
Patrons of mankind, gods, and sons of gods,
Destroyers rightlier call'd, and plagues of men.
Milton, Par. Lost, XI. 691.....T.

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* For an account of the origin and progress of standing armies, see Robertson's Charles Vth, Vol. I. p. 86.....T.

Ruin and devastation occasioned by war.

7. As long as the lives of men are made the mere sport of chance, and the destruction of the human species depends on the fate of armies and the capricious fortune of war, nothing will remain certain or stable, every system of public economy will be tottering, governments will have no point of support, and the slightest cause may, in a moment, overturn kingdoms, and annihilate nations. Ancient empires, that seemed destined to endure for ever, have disappeared from the face of the earth. Without the aid of history, mankind would have forgotten the names of the Assyrians, Egyptians, Macedonians, Greeks, Carthaginians, Romans, and many other formidable states, once the arbiters of the world, now sunk, dismembered, turned into forests, or reduced to barren deserts.

8. War has ever been the greatest scourge of nations. The massacre of men, the devastation of fields and cities, the increase of misery, the decay of laws, the corruption of manners, the constitution of the state neglected and forgotten, such are the inevitable evils which follow in the train of war. The remotest ages present us with a thousand fatal examples;(7) and instances of its effects are too re-

(7) Virgil describes with elegance and precision the fury and calamities of war. *Æneid*, lib. 1, l. 294.

. . . . . *Furor impius, intus*
Sæva sedens super arma, et centum vinctus ahenis
Post tergum nodis, fremit, horridus, ore cruento.

cent to be forgotten. The earth still smokes with human blood; bones scattered over the fields, every where obstruct the plough of the peaceful husbandman. Cities are sacked, and converted into solitary wastes, or heaps of rubbish. What a horrid spectacle does the action of war every day present! The feeble old man abandons, with trembling steps, the abode of his forefathers; the weeping mother drags along, in her flight, her tender children; the afflicted husbandman mourns in vain over the ruin and waste of his harvests; the voice of reason and of law is drowned amid the din of arms!—unbridled license, greedy rapacity, injustice and inhumanity, reign without controul. All tremble in silence before the proud victor, who draws in his train the bloody spoils of the vanquished, to serve as trophies of his fame. In every age, in every empire, conquerors are seen preceded by terror, followed by death and slavery, their laurels bedewed with the tears of humanity.

9. As if the earth did not present a field wide enough for the work of human destruction, the sea has been joined to it, and made one vast tomb. It seems that, unable to attempt other conquests, they have wished to contend for that of the elements. The sea always inspires a haughtiness, natural to men habituated to a nautical life. Maritime commerce, the general tie of nations separated by an immense ocean, has become the instrument of ambition and tyranny. For more than a century

past, nations have fought chiefly for commerce, which is made productive by the blood of their citizens. On the continent of Europe, states are now less unequal, and being confined, and compressed, as it were, by a mutual gravitation, proportioned to their extent, their population, and to a situation more or less advantageous, they seldom transcend their limits: they balance, they agitate, without entirely destroying, each other. The ancient and gigantic ideas of the empire of the world, and of an universal monarchy in Europe, are abandoned, to be revived only on the ocean.*

10. Maritime dissensions more than ever disturb the earth. Under the name of the *empire of the seas,* of an exclusive commerce, it is attempted to restore universal monarchy. Commercial jealousy and political economy, are, at the present day, the two predominant passions of all European governments. Religious fanaticism, and the Gothic pride of feudal manners, have given place to modern systems of finance. The science of calculation, and commercial speculation, are closely connected with the prosperity of empires. The spirit of continental conquests, has been insensibly banished from European policy. They no longer dream of aggrandisement, but in distant climates; and almost all the

* Where is now (1806) the balance of Europe, and who ventures to predict the limits which the present ruler of France may assign to his empire?....T.

wars which have happened for more than a century past, have scarcely had any other object than commerce and colonies. This new order of things accelerates the ruin of states, extends the sphere of war, and deplorably multiplies the heads of that hideous hydra. It is necessary to fight in every part of the world, and in every sea, at the same time. Such is the invention of modern diplomacy.

11. The general interest of nations, imperiously demands, that an equilibrium should be established on the ocean, without which the balance of power on the continent will be a vain chimera, and every pacification a deceitful phantom. It is time to efface from the pages of diplomacy the atrocious maxim which ambition has consecrated to despotism, to tyranny, and to the eternal shame of other maritime powers: "that whoever possesses the empire of the sea holds the empire of the world." While despotism, tyranny, and oppression, prevail on that element, the agriculture, the commerce, and the industry of other maritime nations will be crushed, and the powers of industry stifled in their growth. In short, without the entire liberty of the seas, there will be no more riches; for in this liberty consists the political balance. There will be no equilibrium, peace, nor prosperity, among nations, until each power shall resume its rights, and that portion of property and industry, of free commerce and navigation, allotted to it by nature out of the general domain; until, in short, by a firm, mag-

Nations should unite against monopolies.

nanimous, and fixed resolution, all powers shall agree to destroy every system of monopoly, exclusion, and prohibition, which dries up, and destroys the sources of commerce, arms shore against shore, nation against nation, government against government, which kills, in the bosom of the earth, and in the workshops, the germs of those productions which the unfettered industry of man would have brought to maturity.

12. Europe forms in itself a political system, a social body connected by the relations and different interests of the nations, who inhabit it. It is no longer, as in remote ages, a confused collection of detached portions, each feeling little or no interest in the fate of the others, and rarely concerning itself with what does not immediately affect its own tranquillity. The constant attention of governments to the conduct of their neighbours, the maintenance of resident ministers, and the perpetual negociations carried on with each other, make modern Europe a kind of federative republic, the members of which are independent, but, connected by a common interest, are united together for the support of order and liberty. This gave birth to the celebrated notion of the political equilibrium of Europe, or the balance of power. By this is understood that disposition of things which renders any one power unable to predominate, and give law to the rest.

neral of the Samnites, in Livy. According to the reflection of a great historian, it is better to be a calm spectator of the misfortunes of our neighbours, than to take part in them, unless compelled by very important considerations; for it often happens, that those who do not interfere until after the breaking out of the fire, are involved in total ruin, while the authors of the conflagration remain untouched.(8)

16. War is, in truth, a state of extreme violence, for the nations who are engaged in it; so that even those who remain in tranquillity, and are so fortunate as to maintain an exact neutrality, ought always to expect some impediments in the exercise of their rights, some interruption of their commercial relations; but what may reasonably be required of them, in this respect, is not that they should suspend and break off their lawful commerce, founded on the exchange of their respective productions, by which nature seems to have intended to bring distant nations nearer to each other, to unite all mankind, promote their civilization, increase the happiness of the human race, and induce men, by their mutual wants, no longer to regard each other as enemies. For this reason, the earth, that common mother, rarely produces in the same country, every thing necessary for the use of the inhabitants. Each country, each climate, is better adapted for one pro-

(8) Thucydides, *Hist.* lib. I.

duction than for another. This has been well described by Virgil in his Georgics,(9) which the abbe Delille has translated with his usual elegance.(10)* Thus the establishment of commerce and exchange, is the necessary consequence of the creation of mankind, whose wants oblige them to maintain a close and mutual intercourse with each other, and to form connexions of friendship.

17. Unhappily, political ambition too often throws obstacles in the way of this necessary intercourse of nations, and impedes that maritime commerce, which so greatly facilitates exchange. The quarrels of governments frequently produce national

(9) *Virgil, Georg.* lib. 1, v. 54, et sequ.

(10)* Instead of the French of the abbe Delille, the following is taken from Mr. Sotheby's incomparable version of this inimitable poem:

> Here golden harvests wave, there vineyards glow,
> Fruit bends the bough, or herbs unbidden grow.
> Her saffron, Tmolus, Ind her ivory boasts,
> Spice wings the gale round Saba's balmy coasts;
> The naked Chalybes their iron yield,
> The powerful castor scents the Pontic field;
> While fam'd Epirus rears th' equestrian breed,
> Born for the palm that crowns th' Olympic steed.
> In stated regions, from th' eternal Cause,
> Such Nature's compact, and unbroken laws;
> Such from the time when first Deucalion hurl'd
> The stones that peopled the deserted world.
>
> Georg. lib. 1, v. 54—68....T.

gerent powers have believed themselves perfectly authorised to arrest the commerce of neutrals on the high seas, and to restrain it within certain limits. This strange right of prescribing laws to neutral nations, became extended still further. They were no longer permitted to carry arms, or warlike stores to an enemy, under the penalty of a confiscation of vessel and cargo. These violent acts, evidently opposed to the principles of natural law, have been considered as allowable and just, because, from long usage, they have grown into a title, though sanctioned only by the prejudices of the times, and maintained by force of arms. The cupidity of the ancient maritime powers, and the error of past ages, have thus given rise to the laws of war on the high seas, and to the pretended rights of belligerents over peaceful and neutral nations.

21. In this state of things, every maritime war produces new pretensions on the part of the nations at war, and new claims on the part of neutrals. The latter demanding an almost perfect freedom of navigation and commerce, during hostilities; the former refusing this freedom, and claiming a right to restrain them within narrower limits than before. Both appeal to the law of nations, and both flatter themselves that they find in that Code a decision in favour of their respective pretensions;(11) but, as the

(11) "Every thing proves how much Europe has to regret, that, at the period when the continental powers were represented, and

principles of the law of nations are interpreted, on these occasions, according to the views of the respective parties, it will be necessary to form some fixed ideas of these principles, and to disentangle them from the doubt and ambiguity to which they are liable. According to the system which I have proposed, I shall endeavour to examine the rights and duties of belligerent and of neutral nations, to deduce from them the extent of the liberty claimed by the latter for their maritime commerce in time of war, and to remark the collision of their respective rights, such as the one may exercise on the high sea, and the effects which result from them, in relation to the other.

ARTICLE II.

Of Neutrality, and of the pretended law of nations on that subject.

§ 1. THE neutrality of powers, who are under no obligation, and have no just motives to take part in the quarrels of two or more belligerents, or, in other words, the continuation of a state of peace, the happy result of a wise resolution to remain neutral, is the greatest good to which nations can aspire. It

under mutual guarantee, in 1648, at *Munster* and *Osnaburg*, their maritime interests were not solemnly discussed, and afterwards fixed on an unalterable basis, by the general consent of the maritime and continental powers."—*Resultat des Guerres*, par M. Arnould, chap. 3.

is the only salutary means of escaping the destructive storms, and bloody ravages of war. Nothing is better adapted to lead contending nations to self-reflection, than the pleasing spectacle of that tranquil felicity which neutral countries enjoy. Virtuous example, may it often become the happy means of universal concord and peace!

2. From this preliminary idea of neutrality, it is easy to judge how important it is to treat of a subject, which forms one of the most essential parts of the law of nature and nations, according to the principles of reason and universal justice; a subject which has, unfortunately, been neglected or forgotten by most of the writers on public law, the greater part of whom have been satisfied with giving some slight elementary notions of it, often denied, sometimes disputed, scarcely ever followed, because always dictated by national partiality.

3. Every maritime war interrupts, or destroys the navigation and commerce, not only of belligerents, but of peaceful and neutral nations. This results from the right claimed by belligerents, to restrain and circumscribe within arbitrary limits the trade of neutrals, by prohibiting them from carrying certain goods to enemy-ports, by prescribing particular laws as to the manner in which their mercantile relations are to be continued, by seizing their vessels on the high sea, sequestering their cargoes in case of any supposed infraction of the rights of the belli-

gerent, and establishing tribunals to decide on questions of prize, and to declare, according to each case, whether they ought to be released, or confiscated for the benefit of the captor.

4. These proceedings of belligerents, in maritime wars, have been an inexhaustible source of complaints and reclamations on the part of neutrals; but as these claims are carried before the tribunals of the powers at war, they are there decided according to the right which each party assumes of doing the other the greatest possible harm, even to the prejudice of peaceful and tranquil nations. This they have clothed under the fictitious names of the *law of necessity*, the *law of war*, and the *law of nations*.

5. The rights exercised in time of war, and supported by force of arms, form a kind of Gordian knot, which publicists are unable, or unwilling to untie. Some have avoided this discussion altogether, or carefully eluded it, by not touching on the subject, restrained either by national prejudice, or by fear of speaking the truth. Others have written according to circumstances only, or to justify certain acts of violence, contrary to every principle of law, and the maxims of universal jurisprudence. As for myself, having no other end in view but the good of mankind, no other law but justice for my guide, no object but truth, wherever it may be found, I deliver my opinion with frankness, without respect of

persons, without partiality, or national prejudice. Taking for my basis the fundamental principles of the immutable law of nature and nations, and resting on this solid support, I shall discuss a subject, equally delicate and important, and which alone can furnish a proper rule for the decision of controversies arising in time of war, between neutral and belligerent nations. When the occasion requires, I shall not fear to combat the opinions of writers who have preceded me in this path, who, though few in number, are not the less divided and opposite in their systems.

6. The theological writers on morality, of the thirteenth century, first began to treat incidentally of some questions relative to neutrality; but their ideas were so confused, they adopted such a variety of principles, drawn from the Gospel, the Holy Fathers, the Canons of the Church, and the natural law, ill understood and ill applied, that their decisions had no relation to the question proposed. They have given us nothing but capricious systems, that mutually destroy each other. Though their design was to prescribe the respective duties of governments towards each other, they have badly defined them, and have not placed them on the true foundations of reason and justice; for they have not considered that all the pretensions of belligerents in time of war, consist in insulting weakness, and abusing good faith.(12)

(12) Of this number of writers were Lessius, Suarez, Soto, Victoria, Molina, Castropalao, Conningius, and others, of inferior

Albericus Gentilis, the first writer on neutrality.

7. Albericus Gentilis,* an Italian, professor of law in the university of Oxford, published, in 1588, a work entitled, *De Jure Belli.* He appears to be the first of the writers on public law, who has spoken, though very slightly, of neutrality. It is in examining a question, which he pretended to discuss, but did not decide, concerning the right exercised by belligerents, in interdicting the commerce of neutrals, and the power which the latter have to continue it, without injury to the former.

8. When Gentilis wrote, war already existed between England and Spain. Philip II, arrogating to himself the empire of the sea, treated with harshness and contempt those nations who endeavoured to share its benefits. Queen Elizabeth was so irritated at his conduct, that she carried on the war with great vigour and animation. This princess had open-

reputation. In this manner, Schiara treats, in his *Theologia Bellica,* the 26th question of the second part, *An deferentes ad Turcas aliosque Christiani nominis hostes biremes, triremes, et alia bellica navigia incurrant excommunicationem Bullæ Cœnæ, et aliorum jurium.*

* Albericus Gentilis was born at Ancona in Italy. Having renounced the Roman catholic religion, he retired to Carniola, and afterwards went to England, where he became Regius professor of law in the University of Oxford. He was esteemed the ablest writer of his time, on the law of nations. He died in 1608. Grotius is supposed to have been much indebted to his works. Philip III, king of Spain, appointed him perpetual advocate for his subjects in all causes they might have in the courts of England....T.

Gentilis wrote by order of Elizabeth.—Grotius.

ly declared, that she could not acknowledge a public law, which, under pretext of sparing commerce and certain ports, rendered war eternal, by successively supplying her enemies with the means of continuing it; that such conduct was contrary to the rights of belligerents, and that she saw herself obliged to make reprisals, and to include neutrals in the hostilities. Gentilis was directed by Elizabeth to write a justification of this doctrine. He did it, it is probable, in spite of himself; for he acknowledges, after having stated the question, that the solution of it was difficult, the English, on their part, claiming the rights of just defence, and neutrals the liberty of commerce.(13)

9. Hugh Grotius, generally considered as the master of the science of public law, from the new method he employed in his immortal work, *de Jure Belli ac Pacis*, (though he has done little more than load with immense, and often useless learning, the subjects handled with precision by Gentilis,) has not ventured to discuss at length the rights and duties of neutrals, deterred by the great difficulties which he confesses he found in the solution of the questions which had already arisen during his time. He could not find, he observes, in the history of ancient nations, any example, from which a general rule might

(13) *Magna quæstio, hinc jure stricto, pro his, illinc stante pro Anglis æquitate.* Aber. Gent. *de jure belli.* p. 18.

be formed for the conduct of all nations, in time of war.(14)

10. Puffendorf appears, also, to have carefully avoided treating of the question of neutrality, in his great work, *de Jure naturali et gentium.* He says a word only on the subject, at the end of the last paragraph of the 6th chapter of the second book, in speaking of the right and privilege of necessity. Yet he has left us a letter, published, in 1701, in a book printed at Hamburg, entitled, Jo. Groningii, *Bibliotheca universalis librorum juridicorum, etc. etc.* page 105. M. Groning had formed the design of composing a treatise *de libera navigatione.* Before executing his plan, he wrote, in 1692, to M. Puffendorf, in order to consult him, and at the same time, explained to him generally the principles on which he intended to erect his work. I shall translate the answer which Puffendorf addressed to him at Berlin, and which the celebrated M. Thomasius, has made use of in his *Paulo-plenior historia Juris naturalis,* since it contains the opinion of a great publicist on the subject of the present treatise.— " The work, Sir, which you propose to write con-

(14) *Sed et quæstio incidere solet, quid liceat in eos, qui hostes non sunt, aut dici volunt sed hostibus res aliquas subministrant. Nam et olim, et nuper de ea re acriter certatum scimus, quum alii belli rigorem, alii commerciorum libertatem defenderent . . . . . Hanc autem quæstionem ad jus naturæ ideo retulimus, quia ex historiis nihil comperire potuimus ea de re jure voluntario gentium esse constitutum.* Grotius, *de jure belli ac pacis,* lib. 3, cap. 1, § 5.

" cerning the *freedom of navigation*, excites my cu-
" riosity. It is a fine subject, and upon which no
" person, to my knowledge, has yet published a par-
" ticular treatise. Yet I much fear, judging by
" what you have intimated in your letter, that you
" will find people who will dispute some of your no-
" tions. The question is certainly one of those
" which has not yet been settled on those clear and
" indubitable principles, which may form a rule for
" all the world. In all the examples which are ad-
" duced, there is generally something of law, and
" something of fact. Each party usually permits,
" or prohibits, the maritime commerce of neutrals
" with enemies, according as it is his interest to
" maintain friendship with those nations, or as he
" feels himself strong enough to obtain from them
" what he wishes. The English and the Dutch
" may say, without absurdity, that it is allowable for
" them to do all the harm they can to the French,
" with whom they are at war, and consequently, to
" employ the most suitable means of weakening
" their enemy, by obstructing and embarrassing
" their commerce; that it is not just that neutral na-
" tions should enrich themselves at their expence,
" by drawing to themselves a commerce, interrupted
" as to England and Holland, and furnishing to
" France succours, to enable her to continue the
" war; especially, as England and Holland usually
" favour the commerce of those nations, in another
" way, by giving them an opportunity to transport,
" and to sell elsewhere, goods of their own growth,

"or manufacture; in a word, that they are very "willing to leave to them the whole of their com- "merce, which they have been accustomed to carry "on, in time of peace; but that they ought not to be "allowed to increase or extend it, by means of the "war, to the prejudice of the English and Dutch. "But as this matter of commerce and navigation "does not depend so much upon rules, founded on "general law, as on particular conventions between "nations, it will be necessary, in order to form a "solid judgment of the question in dispute, to exa- "mine first, what treaties on the subject have exist- "ed, between the powers of the north, and England "or Holland, and whether the latter have offered "terms which are just and reasonable. Yet, on the "other hand, if the powers of the north could main- "tain their commerce with France, by convoying "their merchant vessels, with ships of war, provided "there are no contraband goods, no one will find "fault with them for doing so. The laws of huma- "nity and equity between nations, do not extend so "far as to require one nation, without necessity, to "deprive itself of its gain in favour of another. But "as the avarice of merchants is so great, that for the "least gain, they do not scruple to go beyond all "just bounds, belligerent nations may search neutral "vessels, and if they find any prohibited goods on "board, they have full right to confiscate them. Be- "sides, I am not surprised, that the powers of the "north have more regard to the general interest of "Europe, than to the complaints of a few merchants,

" who do not care if the world is turned upside " down, provided their own avarice is satisfied. " The same powers judge wisely, that it is not pro- " per for them to take precipitate measures, while " other nations are labouring, with all their might, " to reduce to a state of just mediocrity, that insolent " power (France,) who threatens to enslave all Eu- " rope, and to destroy, at the same time, the Pro- " testant religion. This being the interest, also, of " the northern crowns, it would be neither just nor " reasonable, that they should, for the sake of a lit- " tle temporary profit, impede so salutary a design, " which they (the English and the Dutch) are striving " to accomplish, especially as it costs them nothing, " and they run no risque."*

* This letter is inserted by Barbeyrac, in a note to his translation of Puffendorf, liv. 8, ch. 6, § 8. He translated it, he observes, " because it was short, and because M. Groning, being an author of very bad taste, the copies of his book had fallen into the hands of *grocers* and *chandlers*, and, for that reason, had become very scarce." The following is the French:

" L'ouvrage, Monsieur, que vous promettez, touchant *la liberté de la navigation*, excite ma curiosité. C'est un beau sujet, et sur lequel personne, que je sache, n'a encore fait de traité particulier. Je crains bien néanmoins à en juger par ce que vous m'indiquer dans vôtre lettre, que vous ne trouviez des gens qui vous contesteront vos idées. La question est certainement du nombre de celles, qui n'ont pas encore été établies sur des fondemens clairs et indubitables, qui puissent faire regle par tout le monde. Dans tous les exemples, qu'on allegue, il y a presque toûjours quelque chose de droit, et quelque chose de fait. Chacun d'ordinaire permet ou de-

Vattel has written on neutrality.

11. Vattel, in his work, entitled, *Droit des Gens*, book iii. chapter 3, has written fully on neutrality, but he confines himself to a statement of the general

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fend le commerce maritime des peuples neutres avec ses ennemis, selon qu'il lui importe d'entretenir amitié avec ces peuples, ou qu'il se sent de forces pour obtenir d'eux ce qu'il souhaite. Les Anglois et les Hollandois, peuvent dire, sans absurdité qu'il leur est permis de faire tout le mal qu'ils peuvent aux Francais, avec qui ils sont en guerre, et par conséquent d'employer le moyen le plus propre à les affoiblir, qui consiste à traverser ou empêcher leur commerce: qu'il n'est juste que les peuples neutres s'enrichissent à leurs depens, et en attirant à eux un commerce interrompu pour l'Angleterre et la Hollande, fournissent à la France des secours pour continuer la guerre: d'autant plus que l'Angleterre et la Holland, favorisent ordinairement d'une autre maniére le commerce de ces peuples, et leur donnent occasion de transporter et débiter ailleurs les marchandises de leur cru, ou de leur fabrique: en un mot, qu'on veut bien leur laisser en son entier le commerce qu'ils ont accoûtumé de faire en tems de paix; mais qu'on ne doit pas souffrir qu'ils l'augmentent à l'occasion de la guerre, au prejudice des Anglois et des Hollandois. Mais comme cette matiére du commerce et de la navigation ne dépend pas tant de regles fondées sur une loi generale, que sur les conventions particulieres entre les peuples, pour pouvoir porter un jugement solide de la question dont il s'agit, il faut examiner avant toutes choses, quels traités, il y a eû la-dessus entre les puissances du Nord, et l'Angleterre ou la Hollande, et si celles-ci leur ont offert des conditions justes et raisonnables. D'autre côte néanmoins si les puissances du nord peuvent maintenir leur commerce avec la France, en faisant escorter les navires marchands par des vaisseaux de guerre, pourvu qu'il n'y aît point de marchandises de contrabande, personne n'y trouvera à redire. La loi de l'humanité et de l'equité entre nations, ne s'entendant pas jusqu'à exiger que, sans ancune necessité, un peuple se prive de son profit, en faveur d'un autre. Mais comme l'avidité des commercans est si grande, que, pour le moindre gain, ils ne font

Vattel confines himself to the maxims of Grotius and other writers.

maxims taught by Grotius and his commentators, Gronovius, Barbeyrac, and the two Cocceii,* and afterwards treated of in the dissertations of Bynkershoek, Henry Cocceius, and Heineccius. (15)

aucun scrupule d'aller au de la des justes bornes, les nations, qui sont en guerre, peuvent faire visiter des vaisseaux des neutres; et, s'il s'y trouve des marchandises defendues, les confisquer de plein droit. D'ailleurs, je ne suis pas surpris que les puissances du nord aient plus d'egard à l'intérêt general de toute l'Europe, qu'aux plaintes quelque negocians, avides de gain, qui ne se soucient pas que tout aille sens dessus dessous, pourvû qu'ils satisfassent leur avarice. Ces mêmes princes jugent sagement, qu'il n'est pas à propos pour eux de prendre des mesures precipitées, pendant que d'autres peuples travaillent de toutes leurs forces à reduire dans un etat de juste médiocrité cette puissance insolente, qui menace de mettre toute l'Europe dans les fers, et en même tems de ruiner la Religion Protestante. Ce qui étant aussi de l'intérêt des couronnes du Nord, il ne seroit ni juste, ni raisonnable, que, pour un petit profit à tems, elles troublassent un dessein si salutaire, dont on tâche de venir à bout tant qu'il leur en coûte rien, et qu'ils courent aucun risque," &c..T.

* Henry Cocceius was born at Bremen, in 1664, and was professor of law at Heidelberg, Utrecht, and Frankfort. He died in 1719. His works, held in great estimation in Germany, may be found in 8 vols. 8vo.

Samuel Cocceius, son of Henry, was born at Frankfort on the the Oder, and died in 1755. He was Minister of State, and High Chancellor to Frederick the Great, king of Prussia. In 1747, he published the *Frederican Code*, in 3 vols. 8vo. He published also, an edition of Grotius, *de jure belli ac pacis*, printed at Lausanne, in 1757, in 6 vols. 4to. He was a man of erudition, and deeply conversant in public law....T.

(15) Bynkershoek, *Quæstiones juris publici*, lib. 1, cap. 9, 10, et 14. Henric. Cocceii, *de jure belli*, and in another dissertation, *de*

Valin's treatise on captures.

Besides, he has added nothing of his own, satisfied with having collected and heaped together principles of justice, and schemes of policy which rarely coincide. This renders his work confused, and breaks the chain of arguments and proofs, on which depends the certainty of the doctrine of the universal law of nations.

12. The French, who have written much on every subject, have hitherto been contented with the *Traité des Prises*, by Valin, published at Rochelle, in 1763, in two octavo volumes. But this learned writer merely repeats the principles of French jurisprudence, concerning maritime captures, contained in the ordinance of August, 1681, the arrets of the kings council, and the edicts and regulations made on this subject; principles which he has laid down in his commentary on the *Marine Ordinance*. He has subjoined to it a summary of the mode of procedure, to be observed in this respect, and has made some additions which serve to modify, or correct certain passages in his commentary. Valin only speaks of neutrals incidentally, in the fifth chapter of his work, where he points out certain rules, which neutral vessels, whether of friends or allies, ought to observe, in order to guard against capture.

13. The chevalier d'Habreu has written, in Spa-

commissis. Heineccius, *de navib. ob vect. vetitarum mercium commissis.*

nish, an excellent treatise on maritime captures, entitled, *Tratado juridico-politico sobre las presas maritimas*, published at Madrid, in 1756.(16) The author, who handles the subject with much erudition and good sense, adopts the principles established by the publicists of his time, and the maxims of jurisprudence consecrated in Spain by the laws which bear the names of *Fuero Real, Fuero Jusgo, Leyes de Partidas, Leyes de la Recopilacion, Curia Philippica*. Habreu says but little of neutrality, and that in his ninth chapter, where he discusses the question concerning the capture of the goods of enemies laden on board of neutral vessels. The subject is not sufficiently investigated by him, nor settled on general and satisfactory principles; for his work is a sort of commentary on the Spanish jurisprudence, and on privateering in time of war.

14. Hubner, in his treatise, *de la saisie des bâtimens neutres*, published at the Hague, in 1759, is the first who has reasoned to any great extent on this part of public law; but he has not given a general treatise of the rights and duties of neutrals. He is satisfied with saying as much concerning them, as was necessary to elucidate the question of the cap-

(16) This work has just been translated into French by M. Bonnement, a distinquished lawyer. Some learned notes are added, taken from principles established by the decisions of the council of prize.

ture of their vessels, the only object he proposed to examine. This work wants method, and is destitute of that clearness which the subject demanded. He often contradicts himself, especially when he adopts blindly, and without examination, the opinions of writers who have preceded him. He has thus been led to extend the rights of belligerents, and contract those of neutrals, more than some of the publicists on whom he relies.

15. Galliani, an Italian, in his work, entitled, *Dei doveri dei Principi neutrali verso i principi guerreggianti, e di questi verso i principi neutrali*, published at Naples, in 1782, is the first among the publicists of Italy, who has had the courage to treat of this subject, agreeably to the principles of morality and justice. He has considered it less, however, according to the general theories of the law of nations, and of the conventional law of Europe, than in relation to the natural and essential duties of nations, the rights of asylum and protection belonging to neutral powers within their own territory, their commerce with nations at war, and the existing usages observed by them. Though this work, which the author, in his advertisement informs us, was written *in consequence of an irresistible order, in a short time, and without the help of any book*, (a thing which no person believes,) has the usual faults, to be found in all the productions of this illustrious writer, who is eager to attack every thing, and to support his opinions by an erudition, sometimes foreign

to, and often at variance with, his system, yet I have derived advantage from the different questions which, like a true and learned publicist, he has discussed. If he has not succeeded in giving a perfect solution of these questions, he has, at least, examined them so philosophically, that others may derive benefit from his work, by applying, with less prepossession, the theory to practice, and by making a more judicious analysis of the practice itself.

16. Lampredi, a celebrated professor of public law in the university of Pisa, in a work, entitled, *Juris publici universalis, sive juris naturæ et gentium theoremata*, printed at Leghorn, in 1778, has pointed out, incidentally, some principles on this subject; but he was unable, at that time, to treat of it so extensively, as he afterwards did, in his second work, published at Florence, in 1788, under the title, *Del Commercio de' popoli neutrali in tempo di guerra.*(17) Though this writer, whose works do honour to his country, proposed to treat exclusively of neutral commerce in time of war, he appears to have intended nothing more than an essay on the subject. He has laid down, with the greatest precision, the fundamental principles of the law of nations;

(17) This work has been translated into French by M. Peuchet, with an *appendix*, containing some views on the search of neutral vessels, and the treaties of peace between the powers of Europe, concluded since the publication of the work of Lampredi.

but he has not had patience sufficient to deduce all the consequences he might have done, in order to form a right judgment in every possible case. This production appears to be a preliminary discourse to a more considerable work, the execution of which he probably meditated, when a premature death snatched him from the republic of letters, to which by his vast and extensive knowledge and erudition, he would have rendered the greatest service. In spite of the laconism, and even precipitancy of this work, I confess, that I have often taken it as a guide in my researches, and, on a more close examination, have discovered some articles, which display the hand of a master, though not always expressed in a decisive manner.

17. Among the maritime captures which most attracted the attention of Europe, during the last war, may be distinguished that of the rich Spanish register ship *Santa Yago*, taken the 5th April, 1793, by the French privateer *Le Dumourier*, and retaken, nine days after, by the English sloop of war *Edgar*. The process instituted in England for the restoration of this prize, induced M. MARTENS, a learned professor in the University of Gottingen, and the distinguished author of several works on public law, to publish, in 1795, an Essay on Privateers, Maritime Captures, and Recaptures. In the first chapter he traces the history of privateering from the middle ages to the present time; and in the second, makes some rapid observations on the *modern* rights of pri-

vateering, in which he follows the general principles laid down by M. Valin, in his *Traitè des Prises*, and by Emerigon, in his *Traitè des Assurances*. The third chapter is divided into two sections, in which he endeavours to establish some theories of the universal, and positive law of nations, on the subject of recaptures. He gives a brief and very imperfect account of the ancient Codes of maritime law, and takes a cursory notice of the laws and treaties of some of the northern powers on the same subject. He passes over, in silence, the ancient and modern laws of many of the Italian states, of which so ample a view has been given in the first volume of the present work. The essay of M. Martens displays much erudition, which will render it instructive, and highly useful to those who feel interested in the progress of the science of maritime legislation.*

* This work of M. *Martens* has been translated into English by *Thomas Hartwell Horne*, with notes, in one volume 8vo, printed at London, in 1800. The translator has subjoined "a Discourse, by the same author," in which the rights and duties of neutral powers are briefly stated.

Besides the writers on neutrality mentioned by our author, several have appeared in Great-Britain, who deserve notice.—Among these, the works of two may be distinguished, as exhibiting the claims of the belligerent, at least, in regard to neutrals, in their fullest light. The first is, "A Discourse on the Conduct of the Government of Great-Britain, in respect to Neutral Nations," written, in 1758, by Charles Jenkinson, esquire, now Earl of Liverpool, a new edition of which was published

ARTICLE III.

Of the Essence of Neutrality.

§ 1. NEUTRALITY is *the strict continuance of the peaceful state of a power, who, on the breaking out of a war between two or more nations, wholly abstains from taking any part in their quarrel.*

2. Galliani who, in the first chapter of his work, (page 7, defin. 5,) endeavours to define neutrality with the utmost precision, in order, he observes, to avoid those errors which he pretends to have discovered in Hubner, has himself committed one that deserves as much reprehension, as he has shewn arrogance, and even bitterness, in the discussion.

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at London, in 1801, to which its venerable author prefixed an ample preface, in which he declares his present conviction of the truth of the propositions and arguments contained in that treatise. In 1801, *Robert Ward*, esquire, author of the "Enquiry into the History and Foundation of the Law of Nations in Europe, to the Age of Grotius," published "A Treatise of the Relative Rights and Duties of Belligerents and Neutral Powers, in Maritime Affairs, in which the principles of armed neutralities, and the opinions of Hubner and Schlegel are fully discussed." He divided his subject into seven propositions, two of which he has examined; but the rest of his work remains to be published. Mr. Ward is a learned and elegant writer, but his manner is too diffuse, and he often reasons more like the advocate of a particular cause, than a sober and impartial judge. He attacks Hubner and Schlegel with great ability and force, and it must be confessed, that with such feeble and unskilful adversaries, he was almost certain of victory....T.

Definition of neutrality by Galliani.

3. He denominates neutrality to be, "*the position* of a prince, who being in a state of repose, of friendship, or of *alliance*, with other princes, who are at peace with one another, continues to remain in the same state in regard to them, whatever cause of rupture or of war, may arise between them."(18)

4. In his first chapter, entitled, *Definitions and Axioms*, (truly puerile) in the 4th definition, Galliani explains what he means by *alliance*. "It is the union of two sovereigns by certain treaties, in which they enter into agreements and promises relative to the supposed event of a future war." If this definition be just, in what manner, in what case, or at what time, can *a prince in a state of alliance*, such as he defines it, remain neutral? If *the clear light of reason*, as he boasts, taught him, in the fifth chapter, § *de Sovrani alleati*, p. 131, "that an alliance contains a promise to unite in all wars of its ally, manifestly just, with all its forces, or with a stipulated number, and even in doubtful wars, when there are reasons in favour of both parties," what other *light* will discover the means of introducing

(18) The little reflection with which this subject was treated under the article *neutrality*, in the third volume of my work on *mercantile jurisprudence*, led me blindly to adopt the definition of Galliani, as well as other principles advanced by him on this subject. I thank heaven for having granted me life, and strength sufficient to acknowledge, and correct my error.

Ipse ego librorum video delicta meorum.

Ovid. *ex Ponto*, lib. 3, epist. 9.

Galliani's definition of neutrality defective.

alliance into his new system of neutrality? If an allied prince, as he says, a little further on, page 133, "when the *casus federis* happens, being obliged to join his ally, cannot pretend to remain neutral," in what sense would he comprehend *allies* in his definition of neutrality, when they cannot, according to the terms of his fourth definition, *avoid taking a part in an actual war?*

5. Galliani, in vain, endeavours, in his fifth chapter, to justify his errors, by heaping together metaphysical arguments, in order to distinguish just from unjust wars, offensive from those which are defensive: all these reasonings tend only to establish the right of the belligerent to declare war, or not, against the ally of his enemy; they do not cure the defect of the definition, which gives to *allies*, without distinction of cases, the power of remaining absolutely neutral. In the following paragraph, from the same page, he thus expresses himself: "In short, "I say, that a prince who declares war against ano- "ther, has no right to declare war at the same time, "without any previous explanation, against the ally "of his enemy; but he ought first to demand of such "ally, whether or not he considers himself within "the case provided by his treaty, and whether, in "consequence, he intends to join and make a com- "mon cause with his ally, or to keep aloof, and re- "main neutral."(19)

(19) This opinion of Galliani, is suceptible of further, and more

Galliani's remark on Hubner's definition.

6. Galliani, in note 1, page 7, asserts, that the definition of Hubner is inaccurate, inasmuch as he describes the formulary of the essential duty of the power that intends to remain neutral, instead of giving a definition of neutrality.(20) Afterwards, making use of a comparison, a little coarse he allows, (which is very true,) but sufficiently clear, he asserts, that Hubner had defined neutrality, "in the same manner as some person did, when, being asked for a "definition of man, he answered, 'Man is an animal "who is bound to love and serve God in this life.' "Certainly," continues he, "this answer would express the first and most essential duty of man, but "it would not define him, since a person who "should not perform this duty, would still retain the "name and figure of a man.(21)

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ample criticism; but the subject I have undertaken to examine, will not allow me to lose time in continual refutations; having, besides, much to combat on points more essential, and more analogous to the object I have in view.

(20) These are the words of Hubner: "*Toute neutralité consiste dans une inaction entière relativement à la guerre, et dans une impartialité exacte et parfaite, manifestée par les faits à l'egard des belligérans en tant que cette impartialité a rapport à cette même guerre, et aux moyens directs et immediats de la faire.*" De la saisie des bâtimens neutres, tom. 1, ch. 2, § 1.

(21) The comparison of Galliani, (with the permission of his blind admirers be it said) would show that he was, in my opinion at least, deficient in logic and sound morality, if it were not well known, that he was one of the most illustrious scholars in Italy. All that can be said to remove the unjust reproach which might be

Remarks on Hubner's definition of neutrality.

7. Galliani has pretended, on what foundation I know not, that the opinion of Hubner, just mentioned, was a definition of *neutrality*. Hubner meant only to express the true state of neutrality, which is all that can be inferred from the paragraph cited. It does not appear that he thought of giving a definition of the word, which he believed useless to his readers. His sentiment, therefore, cannot, in this respect, be justly censured, since he intended only to express the duties of neutral powers. For a stronger reason, we ought not to rely on the comparison of Galliani above mentioned, concerning the essence of man, for he could not be ignorant, that true religion, in leading us to the belief and knowledge of the true God, our Creator and Benefactor, teaches us also, that he demands of us no other duties but those of love, gratitude, and resignation. If any person, from depravity or ignorance, does not love the Supreme Being, or neglects to perform the duties which he has prescribed, though, physically speaking, he does not cease to be a man, that is, to resemble his species, yet it cannot be said, that he has fulfilled the object of his creation. In like manner, we cannot call that power neutral, which, boasting of its neutrality, does not manifest

made against him, is, that, in the course of his work, he has sacrificed his own opinion to the rage of attacking all those, who, though born before him, have dared to treat of this branch of public law, which he believed nature had exclusively reserved for himself. Happily, for me, I write after his death.

The definition here given of neutrality is the only true one.

an exact and perfect impartiality towards the belligerents. Besides, it is evident that Hubner did not intend to define neutrality, but to give only an idea of the essential duties of a neutral, since he informs us, in the same paragraph, " that every nation " which by its conduct, takes no part in the war, as " an auxiliary or otherwise, ought to be considered " as neutral, though it may have made no express " declaration of its neutrality."(22)

8. The definition which I have just given of neutrality, may, perhaps, appear too concise to those who take into view only the actual practice of Europe, and the indiscreet and unjust pretensions of a particular power, which founds its rights on the credit of its finances, and the imposing force of its arms. Readers of this description will believe that neutrality ought not to be exempted from the vicissitudes of war, but liable to all the exceptions, which certain sophists have presumed to introduce into this subject.

9. To prevent all criticisms that may be made on my definition, I shall observe, that, in my opinion, no other general definition of neutrality can be given, and that every thing that may be added to

(22) Hubner, *de la saisie des batimens neutres*, ch. 2, § 1.— " Tout peuple qui ne prend aucune part à la guerre par des realites, est censé neutre, quand même il ne l'auroit pas declarer expressement."

M. Boucher's remarks on the definition of neutrality.

render it more clear, will only expose it to inevitable discussions.(23)

10. A nation is in a state of perfect neutrality, when it preserves a scrupulous impartiality in time

(23) M. Boucher, Professor of Commercial and Maritime Law in the Academy of Legislation at Paris, after heaping eulogies upon me in his work, entitled, *Institution au Droit Maritime*, for what I have advanced in my first work on this subject, when he comes to treat of neutrality in his 32d chapter, thinks my definition inaccurate. He reasons on the subject in the following manner, § 1830, page 458: "The word *pacific* is an adjective, which signifies one *who loves peace*; but does it also present the idea of "vexation suffered patiently, with the intention to maintain peace? "If it does, I acknowledge that the definition of neutrality I shall "attempt to give, will be inaccurate; for to undertake to write, "after M. Azuni, on the same subject, is without doubt to hazard "an attempt beyond our strength. Yet, as I have conceived the "firm resolution never to compose but according to my own view "of things, whoever may be the author I think myself authorised "to combat, I shall venture on the subject." After this modest preamble, I expected from M. Boucher another definition of neutrality, which would characterise its essence with greater precision. My expectation has been deceived, in reading the text of § 1831, which follows in his own words: "Neutrality is the state "of a government in a situation of repose, which takes no part, "active or passive, in the war that arises between two nations. "Nations may cease to be neutral in two particulars. First, "when they appear to have an intention, clearly demonstrated by "facts, to favour one of the belligerents to the prejudice of the "other: in this respect, by taking an active part, though indirectly, "in the war, they cease to be neutral. Secondly, when they suffer their flag to be vexed by one of the belligerents when they "have in themselves the means of making it respected. Or if one "neutral nation, carrying to another neutral, articles which the

Neutrality is not a new state, but a continuation of a former state.

of war, when it takes no part in the quarrels of the belligerent parties, and makes no change in its conduct towards them.

11. Neutrality is not a new state into which a nation, desirous of remaining neutral, enters in time of war: it is a perseverance in an existing state of peace, and a continuation of its correspondence and amity, accompanied, always, with a strict impartiality towards the belligerent powers. According to these principles, the existence of war between hostile nations, does not, in the least, change or diminish the natural independence and liberty of peaceful states, who view with the tranquil eye of indifference the state of violence, by which others are agitated and disturbed. They, consequently, injure no one, by continuing to enjoy the precious fruits of peace, and by maintaining with the belligerent nations, the same intercourse which existed before the war, provided, this is done without any decided preference or favour to either party. This impartiality is the only obligation of neutrals in regard to bellige-

" laws of war do not allow her to carry to one of the belligerents, " suffers them to be taken from her by one of the parties, without " demanding reparation for the affront, she tacitly renounces her " neutrality, by taking a passive part in favour of the nation who " has committed the spoliation." I have not sufficient understanding to comprehend what M. Boucher meant to say in these two paragraphs, and shall therefore forbear making any reply to his criticism, leaving it to the decision of the public, who, on reading this note, will judge between us.

rent powers.(24) It is, therefore true, that the definition by which neutrality is explained to be nothing more than the continuance of a state of exact and perfect impartiality, is not susceptible of any interpretation which can alter the essence of that position.

12. Some doubts may, perhaps, arise in the application of my definition to the different systems followed by nations in the practice of neutrality; though this may create a diversity of cases, we may always adapt to them the maxim drawn from the spirit of the definition, which is an exact and impartial continuation of that state in which a nation happens to be, antecedent to the war.

ARTICLE IV.

Of the different kinds of Neutrality.

§ 1. SOME publicists have divided neutrality into *general* and *particular*. They denominate *general* neutrality, the state of a nation which, not being in alliance with either of the belligerent powers, discharges towards all of them, the duties which are mutual and common to all. By *particular* neutrality is meant the state of a nation which, by vir-

(24) See Ranucci, the illustrious professor of public law in the University of Pisa, in his learned *Eulogy on Lampredi.*

Particular neutrality subdivided into full and limited.

tue of some treaty, is under an express obligation to remain neutral in the war carried on.

2. Others have divided *particular* neutrality into a *full* and *entire* neutrality, and a *limited* neutrality. The first takes place when it is agreed to conduct towards one of the belligerents, in all respects, in the same manner as towards the other. The second, is the case of a neutral nation, that is bound to favour one of the two parties more than the other, in relation to certain things, or to certain actions. But this subdivision is founded on usage, rather than on universal law.

3. By reflecting on the nature of neutrality, and on the spirit of the definition which I have given, it will be seen how opposed these divisions and subdivisions are to the law of nations. Every one knows that a nation at war, however powerful it may be, has no lawful right to compel another nation, equally free and independent, to stipulate to observe a particular neutrality, nor to declare, much less to restrain it to, a limited neutrality. Such conventions would be treaties of alliance and subsidy, not treaties of neutrality. It is true, that they are not without example; but they serve only to prove, that nations, as well as individuals, do not always follow the dictates of equity, and that just moderation which ought to characterise civilised societies; since, by the aid of armies, they too often trample under foot the rights

A further division of neutrality by Galliani.

of their fellow men, regardless of the claims of justice and humanity.

Galliani having observed that nations at one time refuse every thing, and at another concede every thing, to the belligerent powers, imagined a new division of neutrality, into that of an *impartial refusal*, and an *impartial concession*.

5. In adopting this distinction, he did not consider, that it became a nullity, in regard to those powers who at the commencement of a war, are in a state of total and absolute indifference, that is, without any commercial relations with either of the belligerents. But, at the present day, no nation is to be found in this situation, unless, for example, we take Persia and China, in regard to Sardinia. It is evident that, without any reciprocal relations or wants, these states would remain absolutely indifferent towards each other. Let a war break out between the two first, the third might declare itself neutral, in the sense of the above distinction, and impartially refuse every thing both to China and Persia, because, they never had any connexion with Sardinia. But suppose a war between France and England, Holland and Spain, Naples and Genoa, how could Tuscany adopt a neutrality in the sense of the distinction made by Galliani? These nations, as well as the rest of Europe, keep up a correspondence with each other, and are connected by commerce, either active

or passive. At the commencement of a war between two or more of these powers, how could Tuscany immediately break off all correspondence with them, by adopting a neutrality of *impartial refusal*, without ruining her own commerce, since in that case she would have none remaining. Yet certainly, in no other way, could she support that kind of neutrality. The merchants who should be provided with goods which they were accustomed annually to sell to those nations, would be reduced, at the commencement of a war, to the hard necessity of remaining idle, and embarrassed with their property, until peace was re-established.

6. Galliani saw very well, that there might be nations to whom his distinction would not apply. Accordingly, in the third chapter of his work, in discussing the question, *whether a prince be allowed to remain neutral*, page 26, he gives the following solution: "It never entered into the mind of any man of good sense to inquire, whether, in case of a war between very distant princes, a sovereign, who has no connexion, or commercial relation whatever, with either, was bound to enter into the war; (to declare himself neutral would have been a better expression.) For where is the man of common understanding, who, supposing a war between China and Japan, would amuse himself with considering, whether the duties of justice required the king of Morocco to take part in the war? It is the same

The new division of neutrality by Galliani, is not correct.

thing with a small nation towards two formidable powers, such as France and the house of Austria."

7. After what has been said, it is easy to see that this division of neutrality is not correct, even in the sense of the author; since the first kind, denominated *impartial refusal*, cannot be admitted, in any case, and is, in fact, a nullity, nor is it generical, or applicable to all nations; and the second species is, at bottom, the same kind of neutrality as the first. This is sufficient to evince its inaccuracy, since it does not embrace the diversity of ideas applicable to the division of a generical term, an essential feature in every good division.

8. Having laid down his distinction, Galliani would wish further, that this neutrality of *impartial concession* should be adopted in all wars. The reason he gives for it, is, that if all nations refused to the belligerents the means of continuing the war, or that war must cease when they found the ports of neutrals shut, the neutrality of *impartial refusal* would, in the end, be generally preferred. But I answer, if this refusal serves only to injure the commerce of neutrals, without arresting the scourge of war, why should they deprive themselves of an advantage which others turn to their own profit? Our author has acknowledged, that a negative neutrality, even though it should be practicable at the present day, would be contrary to the interest of a state, as I have already shewn. It may be further

observed, that the liberty of granting every thing to all parties, would preserve the neutral nation from embarrassment; and by preventing any infractions of law, and taking away all pretext for the continual complaints of the belligerents, it would leave the field open and free to the merchant to purchase, both in time of peace and war, every species of merchandise, and to gain a profit from them in commerce, as well as supply the wants of the state.

9. In reflecting on the principles thus far explained, it will not be difficult to prove, that the division of neutrality into two kinds, first conceived by me, really separate and distinct, and which cannot be confounded together, is the most certain, and ought to be preferred. It is the one too, which Europe has adopted in practice, though without any such specific denomination.

10. Every nation, at the present day, may be commercial. It either carries to another nation the sorts of merchandise necessary to it, and receives in exchange other goods, to supply its own wants, in which case it is engaged in what is called an *active* commerce; or it suffers other nations to bring their merchandise to its shores for their use, and to take away other articles in exchange, which are wanted abroad; in the latter case the commerce is merely *passive*.

Neutrality is either active or passive.

11. By applying the spirit of my definition to this theory, it will be found, that neutrality is either *active* or *passive*. Thus every nation wishing to remain impartial towards the belligerents, has only to maintain itself in the same state in which it was at the commencement of the war, without intermeddling with the quarrels which have arisen between other powers. It will then remain either *actively* neuter, that is, it will continue its commerce with the nations at war, without partiality or diminution; or it will be *passively* neuter, that is, it will not cease to permit other nations to bring into, and to export from its dominions, the goods which they brought into, or exported from the country before the war.

12. This division of neutrality into *active* and *passive*, appears to be the more analogous to the preceding definition, since it is true, according to the axiom derived from the fundamental principles of public law, that, supposing a nation has more commercial relations and connections with one of the belligerents than with the other, it is not obliged, on that account, if determined to remain neutral, to diminish its commerce with the one, or increase it with the other; for neutrality is not a new state, but merely a continuation of that which existed before the rupture.(25)

(25) Galliani supports my opinion in chapter 6, page 143. "It is not," says he, an exact equality of relations towards the two

13. There is also another kind of neutrality, called *armed neutrality*, lately adopted by some powers. Russia first proposed it, with a firm determination to exact it as a right, and to maintain it by the combined forces of all the nations who should accede to the project. The United States of America have already established it, by conventions with France and Sweden, in the treaties of 1778 and 1782.

14. In 1780, Europe experienced the effects of a violent commotion, which commenced three years before, in the northern countries of America. England, France, Spain, Holland, continued to equip new squadrons, and imbued the seas of both hemispheres with blood, in order to decide whether the people of Boston and Philadelphia should be free. The Dutch, long in possession of the commerce of the Baltic, wishing to prevent the vessels employed in this trade, from falling into the hands of the English, navigated them under the neutral flag of Denmark. But this flag was little respected by cruisers, and the vessels that carried it were often sent into

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belligerents, that characterises *neutrality*; it is the continuation of the same moral relations, which existed with them before the war." This is also the opinion of Hubner, though he contradicts himself in many places, liv. 1, ch. 2, § 1: "The most rigorous neutrality does not hinder our carrying on a more extensive commerce with one belligerent party than with the other, according as our own affairs may require, or as we may place greater confidence in one than in the other, and may, therefore, have greater or less communication with it, in proportion to such confidence."

Russia proposes the armed neutrality.

London or Plymouth. The ships of Hamburg, Bremen, and Lubeck, shared the same fate. The merchants of these cities implored the protection of Catharine, empress of Russia; and the better to succeed with that sovereign, they distributed money among her ministers, to engage her to favour their cause.

15. The interest of Catharine rendered her favourably disposed to the measure; her pride also was wounded by the English, who paid no respect to the ships laden in her ports, but even dared, sometimes, to attack those that sailed under her flag. Another motive determined her to protect the navigation of the north. The Count *de Vergennes*, ambassador of France, whose intrigues at Constantinople had formerly displeased Catharine, had just acquired much favour with her, by urging M. de *Saint Priest*, the French ambassador at the Porte, to persuade the Turks to make the sacrifices demanded by Russia. Vergennes, by this means, succeeded in drawing off from the English the assistance of the Russian fleets. This was not sufficient. He formed a vast project, and worthy of a great statesman. He traced out the plan of the armed neutrality, to which almost all the powers of Europe acceded. Well acquainted with the pride of the empress, Vergennes knew how to interest her in the execution of his project. He took care to have it suggested to her by the ministers of Denmark and Sweden. They proposed it to the empress with so much art and address, that she adopted it with-

Sweden and Denmark accede to the armed neutrality.

out hesitation; she was almost persuaded, that it was a plan of her own creation, or at least, she appeared willing that others should believe it her own.

16. From that time, Catharine resolved to employ force for the protection of her vessels, and she proposed to the courts of Copenhagen and Stockholm, to equip each of them a squadron, to be united with that of Russia in defence of their neutrality. The prudent minister, Bernstorff, knew the value of an alliance without which the English would make sport of all the armaments of the north. He consented, on the 19th of July, to the treaty proposed by the empress. Sweden, after obtaining some explanations which she required, as to the manner in which this armament was to be employed to protect their commerce, signed the treaty on the twenty-first day of July, in the same year.

17. Catharine had not waited for the accession of these two powers, in order to make known her intentions to the courts of London, Versailles, and Madrid. Her ambassadors delivered to those courts a declaration in which she complained, that the laws of nations had been violated towards her subjects; that their commerce had been restrained, their navigation interrupted, and that, to prevent similar abuses in future, she was prepared to maintain, by force of arms, the rights belonging to all neutral nations. Her principal claims were specified in the following articles:

Principles of the armed neutrality.

I. That all neutral vessels should be allowed to navigate freely from one port to another, along the coasts of the nations at war.

II. That the goods and effects belonging to the belligerent powers should be free and safe in all neutral vessels, excepting contraband goods.

III. That by contraband goods was to be understood such as are specified in the 10th and 11th articles of the treaty of commerce between her and Great-Britain, extending her obligations in this respect to all other powers at war.

IV. By a blockaded port was to be understood only a port so well guarded by the vessels of the belligerent powers, that it is dangerous to enter.

V. That these principles alone ought to serve as a rule of decision on the legality of captures.

The empress, at the same time, made a declaration, that, in order to carry these articles into effect, to protect the honour of her flag, and to secure the commerce and navigation of her subjects, she had equipped the greatest part of her naval forces; that these measures would in no degree impair that neutrality which she was disposed to observe, until she was provoked, or compelled to transcend the limits of just moderation, and perfect impartiality.

18. The cabinet of St. James soon replied, that since the commencement of the war, it had given the most precise instructions to the commanders of ships to respect the Russian flag. In spite of these assurances, the English continued frequently to stop Russian vessels, and to decide on the validity of the captures, in the British admiralty courts. The empress protested against those tribunals. The controversy was about to become serious. The English put an end to it, by releasing the ships. Prussia, Austria, and even Portugal and Naples, joined the other neutral powers. This confederation was a powerful curb on the despotism of the nation which arrogates to itself the sovereignty of the seas.(26) Other states referred this point to their particular treaties, and to the universal law of nations.

19. This armed neutrality, however, is not a new kind of neutrality, different in its nature from the two pointed out in the preceding division: it is only the means of securing the exercise of the rights of neutrality, whichever of the two kinds above defined, the nation has thought proper to adopt.

(36) See the diplomatic papers inserted in the second and fourth volumes of the *Collection of Treaties*, by M. Martens.

Declaration of neutrality not absolutely necessary.

ARTICLE V.

Of the Declaration of Neutrality.

§ 1. IT follows as a necessary consequence from the spirit of my definition, as well as from the nature of the above division of neutrality, that, to enjoy that state, the nation, desirous to remain neutral, need not to manifest its intention, by any public act, as an edict, or declaration, or in any other form; nor is it bound to stipulate concerning its neutrality, by treaty with the belligerent powers, because, it is not a new state, but merely a continuation of that which existed before the war, with the additional precaution of observing a strict impartiality. It is sufficient, if a neutral power continues to observe the same equal and pacific conduct which it before maintained with the nations who have taken up arms, in order to shew to the world, that there is no change, alteration, nor ambiguity, in its former sentiments. From such conduct it ought to be inferred, that it has adopted a state of neutrality.(27) It would be an act of injustice to violate that state, or to consider it as doubtful, under the specious pretext of its not having been solemnly declared.

2. The close correspondence maintained between

(27) "Every nation, which really takes no part in the war, is considered neutral, though it should have made no express declaration to that effect." Hubner, *de la saisie des bâtimens neutres*, chap. 2, 32, page 52.

A treaty of neutrality is useful, though not necessary.

almost all governments at the present day, by means of ministers residing at their respective courts, renders it easy to demand an explanation from the different sovereigns, and to learn their intentions as to the war which has arisen, in order, after positive answers have been received, to ascertain the neutrality which they intend to adopt, even before time and facts could make it known.

3. Though, in order to claim the rights of neutrality, it may not be necessary for friendly powers to enter into a public treaty for that purpose; yet it is not useless to do so, either for the sake of giving more positive assurances to the belligerents of the fact, by an act the most solemn and sacred which mankind have devised to make known their secret intentions, as to peace and moderation; or the more effectually to destroy all suspicions, and, by that means, to possess a more direct title to the peaceful enjoyment of the rights of neutrality.

4. A treaty of neutrality will further serve to fix in a more precise manner, and to limit as may be thought fit, the course of conduct to be observed by the neutral power towards the belligerent. The only means of maintaining peace, and preventing all difficulty and controversy, is, by making, at once, some change or modification of general rules, or the principles of the universal law of nations.(28)

(28) Vattel, *Droit des Gens*, liv. 3, ch. 7, § 108.—Galliani, ch. 5. in the passage cited.

Effects of a treaty of neutrality on the parties and others.

5. When a power, by a treaty with *all* the belligerents, has engaged to remain neutral, the stipulations of the treaty ought to be the only rule and measure of its obligations. It follows from this principle, that a neutrality contracted with one of the belligerent nations only, does not bind the others, being an act made without their concurrence, and to which they are strangers;(29) unless the treaty should contain nothing prejudicial or injurious to them, for it would become obligatory, if clauses were added that were useful or advantageous. In that case, they ought to consider it as valid, as if approved by them, though not parties to it, and supposing even that the knowledge of it had not been communicated to them. Beyond this, it would not be obligatory on those who were not parties, because, by entering into articles and stipulations useful to one only of the belligerents, and injurious to the others, the power would cease to be impartial and neutral, and would become the ally of the contracting party, and the enemy of the others.

6. The grand dukes of Tuscany, of the house of Medicis, desirous not to offend the belligerent princes and powers, were in the practice, at the breaking out of war, to assemble before the governor of Leghorn, the consuls of the hostile nations, clothed with the requisite authority on the part of the

(29) *Res inter alios acta, aliis non potest prejudicium facere.* Leg. 1, Cod. lib. 7, tit. 60.

ligerents. The duties of neutrals, therefore, may be reduced to the single principle established in the definition given of neutrality, the spirit of which consists in a perfect impartiality towards the belligerent powers, either in relation to the fulfilment of the duties of humanity, or the exercise of their commerce, whether *active* or *passive*.

2. The law of nations is immutable; its principles do not depend on circumstances. In war, an enemy may exercise its vengeance against those, who disregard that law, from whence results, without prejudice of right, a dreadful reciprocity; but no neutral power can interfere in such compensation, nor take cognisance of it. It can only protect itself by its own impartiality and the observance of treaties. A neutral nation is never allowed to give up its rights, for the sake of favouring one of the belligerent parties. The foundation of these rights is the common public law, to which no exception exists. The neutral ought to consider as lawful, whatever either of the belligerents may do to the other; and should regard no act of warfare as unjust,(32) Those who are not judges between the contending nations, and who are no parties in the war, have no right to take cognisance of their acts, or to decide on the justice of their cause;

(33) *Reliqui populi qui neutri partium addicti sunt, quidquid utrinque in bello fit, pro jure habent, nihilque, quod armis ab utraque parte agitur pro injuria.* Coccei, *Disput. de Postlim.* sec. 1, § 4.

Neutrals ought to enjoy the rights possessed before the war.

the parties having no judges to decide between them, can neither be convicted nor condemned. It is necessary, therefore, that every thing done by either of them during the war, should be regarded by all neutral powers as lawfully done.(33)

3. If a neutral power ought not to interfere in the operations of the belligerents, the latter, on their part, ought to observe towards the former a similar conduct. No act, even the least violent, which the laws of war allow against an enemy, can be permitted against a neutral. He ought to enjoy, in their full extent, the rights he possessed before the war, and the belligerent powers can impose no obligations upon him by which he was not bound before the rupture.

4. It is, in consequence, strictly forbidden, as well by the universal law, as by the laws and treaties of all nations, to commence or continue any act of violence against any ship whatever, within the limits of the maritime jurisdiction of a friendly and neutral state, which, according to the principle established in the first volume of this work, chap. 2, article 2, extends at least to the distance of

(33) *Neque enim cognoscère aut statuere de injustitia partium jure possunt qui earum judices non sunt, neque partes quæ judicem non habent, injuriæ ab aliis convinci vel condemnari. Necessarió igitur, utriusque partis factum quod vi armorum peragitur, apud omnes reliquas gentes pro jure erit.* Cocceius, ib.

a cannon-shot from the shore. For this reason, states intending to remain neutral, usually publish, at the commencement of a war, manifestoes in which they strictly prohibit such acts of hostility. There are, besides, in a multitude of treaties, mutual engagements not to commit, nor suffer to be committed, begun, or accomplished, any acts of hostility, within the extent of the maritime jurisdiction of the contracting powers.(34)

(34) Treaty between France and Holland, in 1739, article 36; between Sicily and the Porte, in 1740, article 16; between France and the Porte, in 1604 and in 1740, article 81; between France and Denmark, in 1742, article 33; between Sweden and Tripoli, in 1741, article 7; between Sweden and Sicily, in 1742, article 29; between Denmark and Sicily, in 1742, article 33; between Holland and Morocco, in 1752, article 9; between Holland and Sicily, in 1753, article 16; between France and the United States of America, in 1778, article 6; between Morocco and Tuscany, in 1778, article 7; between the Porte and Spain, in 1782, article 16; between Holland and the United States of America, in 1782, article 5; between Sweden and the United States of America, in 1783, 1st *separate* article; between Spain and Tripoli, in 1784, articles 6 and 14; between Prussia and the United States of America, in 1785, article 7; between Spain and Algiers, in 1786, article 4; between Great-Britain and France, in 1786, article 41; between France and Russia, in 1787, article 28; between the United States of America and Morocco, in 1787, article 10; between the Porte and Russia, in 1787, article 24; between Great-Britain and Tunis, in 1762, articles 3 and 4; between Denmark and Genoa, in 1789, article 13.

The declaration of the Ottoman Porte, of the 23d September, 1802, on account of its wisdom, deserves to be known. It is conceived in the following terms:

If two hostile ships be in a neutral port, one must sail before the other.

5. In order that this neutrality may not be, in the least degree, violated, in the case where two vessels hostile to each other, are in a neutral road, or harbour at the same time, one of them ought not to set sail until twenty-four hours after the other has weighed anchor, unless it give sufficient security not to commit any act of hostility.(35) This maxim is even expressed in some treaties, particularly with the Barbary powers, in which a different number of hours is fixed.(36)

" Ships belonging to the belligerent powers must abstain from " all acts of violence or hostility against each other, within the " ports and harbours of the Sublime Porte, under the cannon of " fortresses, and within the distance of three miles from its terri- " tory in Europe and Asia.

" All Rayas, or other mussulmen, are forbidden to enrol them- " selves in the service of France or England, during the war be- " tween the two powers. In like manner, they are not allowed to " load any goods or effects on board of English or French vessels, " without being previously furnished with the formal documents " from the commercial agents of those countries resident in the " sea-ports and harbours of Turkey. Finally, it is agreed, that " neither the captains of the Ottoman fleet, nor any other officers, " shall take any part in the engagements which may take place " between the ships of the two belligerent nations."

(35) See the manifestoes of neutrality, cited above in the fifth article, especially, that of Tuscany, articles 4 and 5; of Genoa, articles 2, 3, and 4; of Venice, articles 11, 12, 13, and 14; of the Pope, in the introduction to his edict of 1779.

(36) The treaty between Sicily and the Porte, in 1740, article 18; the treaty between Sweden and Tripoli, in 1741, article 7,

Neutral territory is inviolable.—Belligerents must indemnify neutrals.

6. The territory of a neutral nation ought to be inviolable, that is, the least act of hostility neither can, nor ought to be exercised within it. Hostile armies cannot, therefore, levy taxes, make loans, or exactions, or commit any violence, within the neutral territory. On the contrary, they ought to respect persons and property.

7. This natural law of nations can be limited only by treaties and express conventions. If at any time, inexorable necessity compel a belligerent power to stop the transportation of the goods of a neutral to its enemy, and to seize them, it is under a natural obligation to make reparation for all the damages occasioned by the seizure. It would be a manifest injustice and violence to drag a neutral and pacific nation into the calamities of war, and reduce it to distress and misery, without regard to its firm and faithful neutrality.

8. It would, therefore, be unjust, and contrary to sound morality and the principles of the law of nations, to endeavour to impose on neutrals conditions that would render their situation painful and misera-

fixes the time at two days; that between England and Morocco, in 1750, article 15, and in 1761, article 22, fixes it at 40 hours; the same time is given in the treaty between Holland and Morocco, in 1752, article 10; the treaty between Spain and Tripoli, in 1784, article 15, fixes it at 48 hours; and that between the United States of America and Morocco, in 1787, article 11, at 24 hours.

Neutrals ought not to be forced to take part in a war.

ble, by reducing them to the hard alternative, of renouncing all commerce, or of justly irritating one of the belligerent powers.(37)

9. Yet the history of Europe presents examples of nations, who, notwithstanding their declared neutrality, have furnished troops, recruits, money, warlike stores, and provisions of every kind to one of the belligerent powers. But these examples are regarded as real abuses of the rights of neutrality, practised by nations who are morally certain that they shall not be attacked on account of the succours furnished by them, either by reason of the advantageous situation of their country, or because of the guarantees and complicated rights of other sovereigns. So true it is, that nations often remain exempt from all the evils of a war, without having made any special treaty to guard against them.

(37) Leg. 74, Digest. lib. 50, tit. 17, *de Reg. Jur. Non debet alteri per alterum iniqua conditio inferri.* The Athenians adopted the practice of imposing on the weaker states by an imperious tone. When desirous of turning to their own advantage the neutrality of Potidea, they imposed on its inhabitants, conditions so hard, that they, in despair, joined the Spartan confederacy. They thus proved the truth of the maxim, that an extreme rigour towards neutral powers often compels them, in spite of themselves, to pass from a state of indifference to that of enmity. Και τουτω, τι αλλο η τους μεν υπαρχοντας πολεμιους μεγαλωνετε, τους δε μηδε μελλησοντας γενεσθαι, ακοντας επαγεσθε.

Thucydides, Hist. Bel. Pelop. lib. 5.

Neutral states have sometimes furnished succours to one of the belligerents.

10. It has been seen in former times, and, perhaps, it may again happen, that treaties of alliance and of subsidy have been concluded and agreed on between one of the belligerents, and another nation supposed to be neutral, by virtue of which the latter furnished the other with troops and recruits, for pay, or gratuitously, without its producing a rupture with the other belligerent party. Not to render odious the too recent treaties of European powers, to prove this fact, recourse will be had to more remote examples.

11. The States-general of the United Provinces aided Denmark, in this manner, in the war which she carried on with Sweden in 1658 and 1659, and assisted it with all their naval forces, and a great part of their troops, without any war arising in consequence between them and Sweden. In 1663 and 1665, France and England supported, with their troops, Portugal against Spain, who did not avenge herself by turning her arms against them. The kings of Denmark, Christian V, and Frederick IV, sent to the war of 1668, and to that of the Spanish succession, considerable bodies of troops in the pay of England and the States-general, who served against France, though peace subsisted between her and Denmark, who did not cease, on that account, to be considered as neutral.

12. These, and many more modern examples, which might be adduced, prove merely, that nations

Cases of a neutral sending succours, unmolested by the injured party.

at war, against whom the troops of a neutral state have fought, or succours of another kind have been sent, if they do not take vengeance for such conduct, are influenced by some political considerations, perhaps by weakness, or sometimes by necesity. It is often difficult to attack the nation that sends these succours. Sovereigns are frequently deterred from it by the fear of creating another open enemy, and therefore suffer a less evil to avoid a greater. Hitherto, the law of nations has not given its sanction to such aid afforded by a neutral state, as a consequence of the rights of neutrality. On the contrary, there are instances in which such succours have been considered as acts of hostility, and have given rise to a lawful war.

13. In this light, did Louis XIV consider the succours sent by the emperor, and the elector of Brandenburg, in 1672, to the United Provinces; and when, in the war for the succession of the house of Austria, the States-general lent their aid to the heir of Charles the VI, by arming against France, yet pretending to preserve their neutrality, Louis XV, without regarding this pretended character, attacked them, in 1747, as declared enemies. The same war, and that of 1756, between Austria and Prussia, furnish similar examples, which prove, that the nations of Europe have had very different opinions on this subject, according to the difference of times and circumstances. We may say of powers who conduct in this manner, what Florus formerly

said of Marseilles, that, in pursuit of peace, she had plunged into the war she dreaded.(38) Excessive prudence often degenerates into imprudence; and, very commonly, in the affairs of this world, nothing brings us sooner into danger, than too much care to avoid it. The diplomatic history of Europe, is too full of these problematical, and ever-varied facts, to enable us to form a system of principles that may serve as the basis of decision in particular cases which may arise. The ancients estimated, at so high a price, the merit of the neutrality stipulated towards them, that they regarded it as a sacred protection and safeguard. The Greeks, when passing through Persia, which was neutral, scrupulously paid for every thing; and Plutarch informs us, that Pompey, desirous of preventing his soldiers, in Sicily, from committing any violence contrary to the faith of neutrality, hid their swords. We are less astonished at this regularity of conduct in enlightened nations, than in others known afterwards, and of whom we have scarcely any other ideas than those of barbarism, such as the Goths, the Huns, the Alains, who were not, however, the less scrupulous on this point, judging, at least, from what remains of the military ordinances of Theodoric and Alaric.

(38) *Nihil hostile erat in Gallia; pacem ipse fecerat; sed ad Hispanienses Pompei exercitus transeunti per eam duci portas claudere ausa Massilia est. Misera, dum cupit pacem, belli metu in bellum incidit.* Florus, *Histor.* lib. 4, § 6.

The barbarous nations respected neutrality.

We see in them the particular attention paid to the preservation of property in those countries which were under the safeguard of neutrality.(39)

(39) Pecquet, *Esprit des Maximes Politiques.* Grotius, *de jure belli ac pacis,* lib. 3, cap. 17.

CHAPTER II.

OF THE FREEDOM OF MARITIME COMMERCE IN TIME OF WAR.

ART. I.

Of the Commerce of Neutrals in general.

§ 1. WHOEVER reflects on the principles which have been unfolded in the preliminary discourse to this work,(40) will be convinced that the first law which nature has engraven on the heart of man, is to do wrong to no one, that is, to do nothing which may injure another in his person, property, or rights, if, in his turn, he desire to be respected in the same social relations.

2. The application of this principle to the general relations of all states, has given rise to the origin and establishment of the universal law of nations, which imposes on each political society the obligation not to injure or disturb another in the peaceful enjoyment of its property and rights. On this supposition, we find established among nations, the incontestable right of trading with each other, of trans-

(40) Vol. I, page xviii, &c.

The freedom of commerce is a natural right.

porting, and reciprocally exchanging, at all times and without exception, all kinds of wares and merchandise, from the commerce of which they expect to derive any certain advantage. If a third nation be in a state of peace or war, this cannot, in any degree, impair the right, nor the power of exercising it, which others derive from nature.(41) One nation cannot, in any case, hinder or limit the extent of the commerce of another nation with whom it is in peace.(42) By

(41) "If a nation wishes to continue its commerce with two friendly nations, it has full right to do so; neutrality being a continuance of its former state, and not a new state of things." Galliani, ch. 9, § 2, page 295.

(42) The celebrated Lampredi, in his work *del Commercio de' Popoli Neutrali, in tempo di guerra*, par 1, § 1, gives great weight to my opinion. In page 20, he thus explains himself on this point: "Exchange being the basis of commerce, it clearly follows, that "mankind, and nations in general, not only have a right to carry it "on, but are bound to do so, by the law of nature, as the only "means of their preservation and improvement. I say, *in general*, "for if a nation is fortunate enough to be able to provide for its "happiness and improvement, with the aid only of its own natural productions and industry, it would be under no obligation "to become commercial; as this obligation is hypothetical and "conditional, that is, founded on its own wants of which it is the "only proper judge. But, in every other case, the law exists in "its full force. It makes it my duty to labour, as much as my "strength and ability allow, for the preservation and perfection of "my existence. For this purpose, it has been careful to give me "all the rights without which it could not be obeyed. Finding "no other means of providing for my wants, but by the exchange "of my superfluities, that is, by commerce, it is necessary that "I should have the right to carry it on. It is, therefore, in ge-

Neutrals may carry on the same trade in war and peace.

following this principle, it will be seen that the subjects of a neutral power may continue their commerce, active or passive, on the terms mentioned in the third article, with the same nations, without any lawful opposition on their part, though they be at war with each other.

3. These principles, on which rest all the obligations of neutral nations in time of war, being once established, it necessarily follows, that they ought, at at the same time, to be unrestrained in carrying on their commerce, and that they must retain the power of engaging in it in the same manner, and with the same freedom as in time of peace, observing merely a perfect impartiality during the war.

4. Commerce in all kinds of merchandise, commodities, and articles of manufacture, being allowed in time of peace to the subjects of a nation, so far as the laws of the state, or particular treaties with other powers create no exception, they ought to be permitted to do the same thing during the continuance of war, since neither of the belligerent parties has a right to impose any new obligations on the neutral, which did not exist in time of peace.(43)

"neral, a right perfectly natural, from the exercise of which I "cannot be prohibited without the most flagrant injustice."

(43) Wolfius, (*Jus Gent.* cap. 8, § 683,) lays down this principle with sufficient clearness. *Qui neutrarum partium sunt, ea præstare utrique belligerantium parti debent, quæ jure gentium*

By the universal law of nations, no goods are contraband.

5. The universal law of nations, founded on that of nature, in authorising nations to carry on commerce, has made no distinction as to goods which might be the object of trade in time of peace, and not in time of war. By this law, therefore, there can be no goods, commodities, or manufactured articles, which may not be sold or carried to the belligerents. Neutrals cannot be denied the privilege of letting to the powers at war their men, their ships, and every means of transportation, pursuant to their former practice, provided, that when they shall be requested to furnish things which they are in a situation to procure, they do not refuse to one what they grant to another.(44)

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debentur extra bellum, nisi expresse de quibusdam aliter conventum, quæ respectum habent ad bellum ..... Qui neutrarum partium sunt, eorum respectu bellum non est, ipsi vero utrique belligerantium amici sunt. Quæ igitur extra bellum, seu pacis tempore, gentibus præstantur a gente, ea etiam præstanda sunt, utrique belligerantium parti. Quod uni præstatur, id præstandum quoque alteri est, si eodem indiget."

(44) An example of this natural equity is to be found in Livy, lib. 37, cap. 28.

The Teians had furnished a quantity of provisions to the fleet of the enemies of Rome. The prætor Emilius threatened to sack their city, if they did not furnish as much to the Roman fleet. "The demand," says Lampredi, "was just, so far as they could satisfy it without injury to themselves." Wolfius, also, in the passage of his work which furnished the last quotation, adds this conclusion. *Ea enim fieri debent quæ facienda sunt, si bellum non est, ut diximus. Cavendum saltem est, nequid fiat, quod prodat majorem*

Neutrals have a natural right to trade in all sorts of goods.

6. A great portion of the commerce of several European nations, as the Swedes, the Norwegians, and Russians, consists in articles necessary in maritime wars, for building and equipping fleets. They sell, in time of peace, to all who may want, iron, copper, masts, ship-timber, tar, pitch, turpentine, and cannon for ships of war. Why should these nations be deprived of their principal trade, and, consequently, of the means of subsistence, on account of a war in which they have no interest or concern?(45) There is nothing in the Code of justice or equity, that authorises such a pretension on the part of the belligerents. It is necessary, therefore, to lay it down, as a fundamental maxim of every Code, that as neutral nations may lawfully continue the commerce carried on by them in time of peace, no distinction ought to be made of the goods, commodities, or manufactures, though adapted for war; and, for this reason, the sale and transportation of them to the coasts of the belligerent countries is allowed, according as their commerce may be active

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favorem ergà partem unam quàm alteram ne justa detur parti uni de neutralitate non exacta servata, quærela."

(45) *Neuter prohibere vel perturbare potest commercia pacati cum altero hostium: idque verum est, et si hostium vires inde augeantur: uti si ferrum, arma, frumenta, aliaque quæ in bello usum habent, afferantur.* Sam. Cocc. *Dissert. Præm.* § 789. Galliani, though always opposed in opinion to Cocceius, could not help, on this point, repeating the same words, in § 3, page 312, which I shall cite, elsewhere, at length, in order to refute himself.

or passive in time of peace, without its being considered in any manner, as a violation of neutrality, provided it be done without any hostile design, and without a marked preference and partiality.(46)

7. Though these principles are generally adopted without opposition, they are, in some degree, modified in practice by the various events of war. They give to a certain extent, to the belligerent powers the right of limiting and restraining, in some sort, the commerce of neutral nations. But this right, not yet settled by a stable and permanent

(46) It may be said, on the same principles, that if a nation trade in arms, ship-timber, vessels, or warlike stores, I cannot find fault with her for selling such things to my enemy, provided she does not refuse to sell them to me, at a reasonable price. She carries on her trade without any intention to injure me, and by continuing it, as if I were not at war, she gives me no ground of complaint. Vattel, *Droit des Gens*, liv. 3. ch. 7. Bynkershoek has also adopted this maxim, *De his quæritur quid facere aut non facere possint inter duos hostes. Omnia, forte inquies, quæ potuerunt cum pax esset inter eos, quos inter nunc bellum est; belli enim conditio non videbitur porrigenda ultra eos qui invicem bellum gerunt. Quæstiones Jur. Publ.* lib. 1, cap. 9. Every man, at the present day, is so well convinced of this truth, that nothing can better show the general disposition of the human mind, than the following reply of a Dutch merchant to a magistrate of Amsterdam, who reproached him for carrying warlike stores to the Spaniards, then at war with France: "As a citizen of this place, I have a right to trade every where; and if, for gain, it were necessary to go to hell, I would willingly run the risk of burning the sails of my ship." *Hist. de la Puiss. Navale de l'Angleterre*, tom. 1, page 225.

system which would fix its laws and true limits, is, in all wars, a source of complaint and controversy. This matter will be the subject of the next article.

ARTICLE II.

Of the Right of Belligerents to limit the active commerce of Neutrals.

§ 1. THE freedom of navigation and commerce has been, at all times, a principal cause of the disputes between the neutral nations who claim its enjoyment, and the belligerents who endeavour to restrain it. The latter suppose, that they have a right to stop merchant vessels on the high seas, and to visit them in order to discover whether they are laden with arms or warlike stores destined to an enemy, or with goods belonging to an enemy; in either case they sieze the vessel and her cargo.

2. If the first part of this work(47) has been read with attention, it will be admitted, that navigation on the high sea ought to be common and free to the nations of the world, all of whom have an equal right to the use of that element.

3. The right of command, and of punishing offences, supposes that of promulgating laws, and

(47) Vol. I. art. 1, *Of the High Sea.* p. 1.

causing them to be executed. In war, a nation has, unquestionably, a right to attack, and take possession of the territory of its enemy. It ought, consequently, to be regarded as the temporary sovereign, throughout the whole extent of the places occupied, during the time they remain under its power. Hence arises the rule of universal reason, that gives to a belligerent nation, wherever it has acquired this legislative and executive power, in all places occupied, besieged, or blockaded, the right of prohibiting strangers from all commerce or communication with the places besieged or blockaded, and to prevent, both by land and sea, the introduction of every species of merchandise, which may retard the capture, or render it more difficult.

4. From the acknowledged certainty of these principles, it follows as a necessary consequence, that this is the only case which authorises a belligerent power to prohibit the merchants of neutral nations from transporting certain commodities, or even any kind of goods, to places occupied by its troops: but it cannot assume this right in any other place, where its authority is not established and acknowledged as lawful, much less on the high sea, which being common to all nations, cannot justly be subjected to any, not even a temporary, law of a particular nation. The rights of war, therefore, do not authorise belligerents to stop neutral vessels on the high sea, or to visit and confiscate them.

The rights of one belligerent in regard to another.

5. Publicists lay it down as an invariable principle, that a nation has a full and perfect right to diminish indefinitely the forces of its enemy, to oppose every means which may be employed to preserve or augment his power, and even to prevent another nation from carrying on a commerce with him, which may increase his resources, or his means of attack and defence, or may destroy the effect of a military operation, which, if not disconcerted, would lead to victory, or compel the enemy to sue for peace.(48)

(48) These writers explain themselves, on this subject, in the following manner: *Est æquo æquius, et favorabili favorabilius, et utili utilius. Lucrum illi commerciorum sibi perire nolunt. Angli nolunt quid fieri contra salutem suum est. Jus commerciorum æquum est, at hoc æquius tuendæ salutis; est illud gentium jus, hoc naturæ est; est illud privatorum, hoc est regnorum.* Albericus Gentilis, *de Jure Belli*, loc. cit. *Interea, quæ, et si pace illicita, tamen in bello in pacatos jure gentium permissa sunt, primum est quod nonnunquam in eos exercere potest, qui commercia cum hoste nostro agunt. Id vero quale sit maximis inter gentes et populos contentionibus et adeo probabilius utrinque rationibus disceptatum fuit, ut ipsum proprie jus gentium collidere videatur. Ab eorum enim parte qui commercia exercent cum hoste, ratio manifesta est; nam indubie jure gentium domini res suas vendere, cui velint possunt. A parte vero eorum qui commercia hæc sibi noxia impediunt, ratio non minus evidens est; nam cum cuique a naturâ ea jura quæ sua tueri ea non potest, uti si non possit nisi impeditis cum hoste commerciis.*" Hen. Cocc. *De Jure Belli inter Amicos*, § 6. *Quamvis enim alter populus forsan suo jure utatur dum talia hosti alterius subministrat, nec minus tamen jure suo utitur qui se adversùs illos defendit, qui hostem reddere potentiorem non dubitant.* Heineccius, *de Navibus ob vect. vetit. merc. commissis*, § 14.

Belligerents extend their rights beyond the bounds of justice.

6. Belligerents founding on these principles a pretended right of necessity, transgress the bounds of equity and moderation, so far as to presume, in their manifestoes at the commencement of a war, to impose restrictions on the liberty of the maritime commerce of neutrals. They except from the ordinary articles of trade, arms and warlike stores, as well as goods belonging to an enemy, which they declare contraband, and good prize. They afterwards stop neutral vessels wherever they are found; and if complaints are made to them of the injustice of such conduct, they return no other answer, than that it is the fault of the neutral merchants, who by transgressing the law published in the very case provided, expose their goods to confiscation. If the theories which have been before presented to the reader be recollected, it will, at once, be seen, that such claims are at best specious, and wholly destitute of any real foundation.

7. The limits which belligerents presume to assign to the commerce of pacific and neutral nations as a rule for their guidance during the continuance of war, are, properly speaking, comminatory laws, since they threaten the offenders with the confiscation of their goods and vessels. Now, the essential quality in a legislator is to have a sovereign power or authority over the persons on whom he intends to impose laws, or over the places in which they are to be executed, or within which the delinquent may be found. But the universal law of nations denies

to belligerents this prerogative, since those on whom they wish to impose laws are not their subjects, but foreigners, and wholly out of their power, so far as they are not within, or do not inhabit, the places subject to their dominion. By a country subject to the dominion of the belligerent, must be understood, not only those places which they possessed before the war, but that portion, also, of the enemy's territory occupied by their armies. Neutrals ought not to regard the mere title, but the actual possession which is sufficient to give the right of jurisdiction.(49)

8. The sea, being always open and common to all nations,(50) and over which the right of war can be exercised only against the property of an enemy or his allies, it does not fall under the dominion of the belligerents. Their prohibitory, or penal laws, are consequently null throughout the extent of the high sea upon which offences, properly speaking, do not, in this respect, exist. Belligerents, therefore, cannot stop those who are not their subjects, unless they be enemies. To publish such laws, and en-

(49) Hen. Cocc. *de Jure Belli inter Amicos*, § 788. *Tertia quod pacati sequantur presentem possessionem* ..... *Alibi distinximus inter possessionem, sive administrationem, et interius imperii. Vicini et medii sequuntur possessionem, quia cum judicandi facultas circa jus eis non competat, naturali ratione factum possessionis respiciunt, et cum eo qui civitatem administrat, agunt.*

(50) See article 1, chapter 1, Vol. I, of this work.

A belligerent has no right to interdict the commerce of neutrals.

deavour to execute them, is to arrogate a sovereign right over persons and places that are not subject to us; it is an attempt to enforce an obedience from men who are under no obligation to obey.(51)

9. The just inference from these principles is, that a belligerent power has no right to interdict, or limit the commerce of neutral nations with the enemy, nor, of course, to subject them to seizure. It has been sufficiently proved, in the preceding article, that the subjects of a neutral state, by the law of nature and nations, have full liberty to carry on commerce in all kinds of merchandise, even in military stores, so far as the laws of their own country, which alone claim their obedience, do not prevent it.(52)

(51) *Galliani*, page 391, confirms this doctrine:—"I say, then, "without hesitation, that no contraband goods belonging to neu-"trals, or freighted by neutrals, seized in a place free, or in a fo-"reign territory, can, on any pretext, be retained by the bellige-"rents, inasmuch as there is no rupture between them and the "neutral nation."

(52) This theory is well explained by Lampredi, p. 5, § 51. "The belligerent may publish as many manifestoes as he pleases; independent nations are under no obligation to pay them the least attention, or to act in conformity to them. He may object, in vain, that the natural necessity of self-defence, gives this right to him, when it becomes essentially requisite. I answer, that my natural liberty, and my independence, give me, also, the right to dispose, as I please, of those things which I have derived from nature, or my own industry has procured, when the use I make of them in regard to the nations at war, is without preference or partiality; which is the only restriction naturally resulting from the neutrality.

Necessity does not justify the stopping neutral vessels in all places.

10. The necessity of a just defence, the ordinary pretext of the unjust and illegal claims of belligerents in time of war, gives only the right to hinder neutrals, in certain cases, from carrying their goods to the ports of the enemy, and to prevent, by all necessary means, the cities or ports, besieged or blockaded, from receiving any aid from neutrals. If, for greater security, they think it necessary to stop neutral ships, this can never be done on the high sea, where no person is clothed with valid authority, but only in the space within which the fleet that forms the blockade rides at anchor; a space which must be considered as subject, for the time, to the legislative and coercive power of the nation occupying it; even, in this case, nothing more can with justice be done, than to detain the vessels, or keep them, on condition of making reparation for the damage which such detention may occasion. It would be an abuse of power, and against all reason, to blockade a neutral port, under the specious pretext of preventing vessels laden for the ports of an enemy from coming out; much more to confiscate them on the high sea, to which the belli-

which I have thought proper to adopt. If he declares, that necessity compels him to make me desist from this commerce by force, I may lawfully use reprisals against him: it is the more lawful to do so, if he should stop or seize the goods of my subjects, when their ships, laden with arms and ammunition, are sailing towards the ports of an enemy; unless, by some express or tacit convention, I have engaged not to permit them to carry those articles to the enemy."

The right of stopping neutrals must be confined to cases of rigid necessity.

gerent right cannot be extended, a right which ought to be confined to such acts as rigid necessity may require for their own defence, and the diminution of the forces of their enemy.(53)

11. In order that belligerents, who refuse to permit the commerce of neutrals with their enemies, may not be taxed with injustice for intercepting vessels, or accused of abusing their power in block-

(53) Hutchinson, *System of Moral Philosophy*, book 2, ch. 18. "But all such damages done to others for our preservation from greater, oblige us to make full compensation when we are able. The great probability or certainty of our making future compensation, justifies many steps which otherwise would have been unwarrantable." Grotius, *de Jure Belli ac Pacis*, lib. 3, cap. 1, § 5, n. 3, ibid. *In tertio illo genere usus ancipitis, distinguendus erit belli status. Nam si tueri me non possum, nisi quæ mittuntur intercipiam, necessitas, ut alibi opposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, id scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio et pax expectabatur, tenebitur ille mihi de damno culpâ dato, ut qui debitorem carceri exemit, aut fugam ejus in fraudem meam instruxit; et ad damni dati modum res quoque ejus capi, et dominium earum debitè consequendi causa quæri poterit. Si damnum nondum dederit sed dare voluerit, jus erit, rerum retentione, eum cogere, ut de futura caveat, obsidibus, pignoribus, aut alio modo. Quod si præterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantum civiliter, tenebitur de damno, sed et criminaliter, ut is qui judici imminenti rerum manifestum eximit; atque eo nomine licibit in eum statuere quod delicto convenit, secundum ea quæ de pœnis diximus; quare intra eum modum etiam spoliari poterit.*

ading neutral ports, it would be sufficient to have a previous convention, in which should be designated, the kind of commerce to be allowed or prohibited with an enemy, at the commencement of a war. Such a measure, the most agreeable to the law of nations, is the only means of maintaining harmony among sovereigns, and of avoiding so many reclamations, and the many losses which neutrals suffer in time of war. These abuses very often dishonour the belligerent powers, whose orders are not always executed, in the manner they ought to be, by the commanders of their armed ships.

12. The king of Sweden, Gustavus I, when a war was on the eve of breaking out, in 1556, between him and Russia, required of Mary, queen of England, by his ambassador, that she should forbid her subjects the navigation of the northern seas of Russia, in order to prevent that power from being supplied with military stores. The republic of Genoa, accustomed to remain neutral, perceived the necessity of a similar precaution in the war it had to sustain against Corsica. It applied to the different powers of Europe, to induce them to prohibit their subjects from carrying arms, or warlike stores, to the Corsicans. At the commencement of the American Revolution, the Cabinet of London demanded, and obtained, from the States-general of Holland, that the citizens of the United Provinces should be forbidden to furnish the insurgents with arms or military stores.

Treaty of commerce between Prussia and the United States.

13. In the treaty of commerce, concluded the 10th September, 1785, between Frederick the great, king of Prussia, and the United States of America, we find the following article, well worthy of being observed and imitated: "To prevent all difficulties "and misunderstandings, that usually arise respect- "ing merchandise, heretofore called contraband, "such as arms, ammunition, and military stores of "every kind, no such articles carried in the vessels, "or by the subjects or citizens of one of the parties, "to the enemies of the other, shall be deemed con- "traband, so as to induce confiscation or condemna- "tion and loss of property to the individuals. Never- "theless, it shall be lawful to stop such vessels and "articles, and to detain them for such length of time "as the captors may think necessary to prevent the "inconvenience or damage that might ensue from "their proceeding; paying, however, a reasonable "compensation for the loss such arrest shall occa- "sion to the proprietors: And it shall further be al- "lowed to use in the service of the captors, the "whole or any part of the military stores so detain- "ed, paying to the owners the full value of the same, "to be ascertained by the current price at the place "of destination."(54)—On the same principle, and

(54) See *Berlinische Monatchirift herausgeg. von F. und J. E. Biester.*

France, who, without being declared a republic, felt herself no longer influenced by a monarch, after the revolution had actually

in the same spirit, is the 15th article of the treaty of friendship, limits and navigation, made between the United States of America, and the king of Spain, the 27th October, 1795.

14. Notwithstanding the apparent collision between the rights of belligerents and neutrals, it is an invariable, and incontestible principle, founded on the rules of universal justice, and the law of nations, that friendly and neutral states should be allowed to continue their commerce, in time of war, in all its extent, in the same manner, and with the same freedom, as in time of peace, without any other

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commenced, and before the explosion of the maritime war, announced a spirit of humanity, which ought to have been acknowledged by all Europe. She proposed to the commercial powers, mutually to forbid the capture of merchant vessels in case of a maritime war. This proposition, either from aversion to the nation that made it, or from the intrigues of its implacable rival, was not accepted by any of the powers, and was soon swallowed up in the vortex of that terrible war which spread over the continent. Heaven grant that France may never desist from a maxim so essential to the general good of commerce, and that she may endeavour to make it, in the end, a fundamental point in all her treaties. I am aware, that it will be difficult for those powers who encourage the solid principles of the general prosperity of commerce, to determine what goods are contraband of war. The animosity which has prevailed since the commencement of the present war, has so much increased their number, that Europe will have great reason to regret it in future, if it does not remedy it in time by a wise and unanimous plan of restriction. Every thing is to be hoped from this enlightened and commercial age, after the fatal experience it has had. This is the object of my ardent vows.

Belligerents may stop the commerce of neutrals in necessary self-defence.

restriction than the observance of the most exact impartiality. The truth of this theory does not, however, deprive belligerents of the right of stopping the commerce of neutrals with the enemy, when they deem it necessary for their own defence ;(55) provided this right be exercised, in places lawfully subject to these acts of sovereign power, and on condition of making good, in all cases, the damages sustained.

15. While the British minister, in 1792, was misleading the opinion of the English as to the disposition of France, his agents were exciting foreign powers against her, but several of them had the courage to resist the most urgent solicitations.

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(55) This opinion is fortified by Lampredi in the solution he gives of two questions stated by him in his work above cited, page 47, 48, § 4. "When war has broken out, may neutrals, without infringing the laws of commerce, furnish the belligerents with arms, military stores, and other contraband articles? I answer, there is no law which forbids them, provided they do it with perfect impartiality, and there are no particular conventions to the contrary. Can the belligerents hinder this commerce, in case the necessity of their own defence should require it? I answer, that they can, in that case, prevent, not only this species of trade, but every other, provided they do no injury to neutrals, or indemnify them, when it happens, unless it be otherwise, agreed between them."

Henry Cocceius had already clearly expressed the same thing in his dissertation *de Jure Belli inter Amicos*, § 13. *Orto inter duos populos bello, non excludi jure gentium pacatos a libero cum hostibus commercio.*

Declarations of neutrality by Venice and the Swiss cantons.

16. In the south of Europe, the grand council of Venice, in the month of September, 1792, resolved to maintain a neutrality towards France. Its resolution appears to have been founded on the following reasons: 1. "That its accession to the coalition of powers, would bring no weight into the scale. 2. The risque the republic would run, by such an accession, of propagating what was termed, the *pernicious principles of Gallic madness*, instead of arresting their progress by silence, and a wise conduct at home."

17. The Swiss cantons replied, tardily it is true, but to the same effect, to the note of the English ambassador, of the 30th November, 1792; "Accustomed," they say, "scrupulously to observe our engagements, we shall not depart, under any pretext, from the neutrality we have declared: we shall listen to no insinuation, that may give just cause of complaint. Our zealous exertions will be solely directed to maintain ourselves in the enjoyment of our happy and peaceful situation: we shall unite all our forces to resist the slightest attempt that shall be made to disturb our repose, instead of sapping its foundations by destructive principles."

18. Turkey announced to M. Fonton, on the 27th March, 1793, its declaration, to the following effect: "That it is publicly known, that the Sublime Ottoman Porte is the friend of the French, and that she, consequently, thought it her duty to manifest

" her intention to observe a perfect neutrality in the " war just declared between France, England, Hol- " land, Prussia, and Germany. She imparted this " in a friendly manner to the principal of the French, " that he might inform, whom it might legally con- " cern, in France, that the belligerent powers being " all the friends of the Sublime Porte, she determined " to remain neuter in that war."

19. On the 24th December, 1793, the national convention declared, " That the treaties between France and the Republic of Genoa, should be faithfully observed, notwithstanding the catastrophe which had happened to two hundred Frenchmen, killed in the ports of Genoa, by the English, without any agency of the Genoese."

20. In the north, the death of Gustavus III, which happened in March, 1792, deprived the coalesced powers of the warmest enthusiast in the war against France.

21. In the month of March, in the same year, the court of St. Petersburg officially announced to the court of Copenhagen, the sending of twenty-nine sail of the line into the Baltic, and proposing a co-operation in the measures about to be taken against France. The king and prince regent declared, that they could not enter into any of the plans against the French nation. Solicitations on this subject, equally pressing, were made by the courts of Berlin and

Vienna, who in their solemn notifications, represented to the Danish minister, "that the concert of powers against France, had two objects; first, the rights of the injured princes, and the danger of the propagation of French principles; the second, the re-establishment of a monarchical government in France." In his answer, of the first June, 1792, the Danish minister assured them, "That his Danish majesty could not join the concert of powers, in conformity with the rules of government which were proper for him, and that under these circumstances, he could only express his regret."

22. The duke of Sudermania, regent of Sweden, animated by sentiments more agreeable to the interests of Sweden than those possessed by Gustavus III, sent in May, 1793, to the different powers the following notification: "That his Swedish majesty, is resolved, invariably to maintain, during the existing war, the strictest neutrality towards the coalesced powers as well as towards France; that whatever circumstances might arise, or whatever steps they might take in this respect, they could never induce his majesty, much less oblige, or compel him to change in the least, this unshaken resolution: that his majesty believed this determination to be founded on the law of nations, on the rights of his crown, and on the right all governments have to live in peace, and preserve to their subjects the enjoyment of its benefits; the king therefore meant to observe, for his kingdom, a strict neutrality towards the belli-

Orders of the English council, in June, 1793, to their cruisers.

gerent powers." This notification of the Swedish government was immediately followed by a declaration relative to the navigation of its subjects in time of war; it assumes in this note the principles of the positive law on the subject of contraband of war.

23. In the mean time, the council of the English king issued, the 8th June, 1793, an order concerning the navigation of neutrals, some of the regulations of which are as follows:

Art. I. It shall be lawful to seize and detain all vessels, laden in whole or in part, with corn or meal, destined to any port in France, or to any place occupied by the French armies.

Art. II. It shall be lawful for the commanders of his majesty's ships, or of private armed ships, having letters of marque against France, to seize, and bring in, all vessels, whatever may be their cargoes, that may be found sailing towards a blockaded port, that they, as well as their cargoes, may be confiscated, excepting Danish and Swedish vessels, which, for the first time, shall be only turned away from such ports, but, the second time, they shall be seized in the same manner, and brought in for confiscation.

24. The violence with which the commerce of neutrals was threatened, was further manifest from the hostile intentions shown by Russia, at the insti-

gation of England, against their navigation, and by a note which the *chargé des affaires* of the former power sent, the 30th July, 1793, to the grand chancellor of Sweden:

"The undersigned, chargé des affaires of her imperial majesty, empress of all the Russias, referring to the friendly and confidential overtures which the Russian ambassador, count de Steckelberg, was authorised to make, at the beginning of this year, to the minister of his Swedish majesty, in concert with the envoys of the other courts interested in the present war, has the honour, this day, to notify to the said minister, that her imperial majesty, agreeably to an arrangement made with his Britannic majesty, has determined to send a squadron of twenty-five ships of the line, and several frigates, destined to cruise in the Baltic and the North seas, for the purpose of arresting and cutting off the navigation and commerce of the rebellious French."

95. The answer of Sweden to Russia, in August following, was in substance as follows:

"As the independence of Sweden, in a great measure, depends on her commerce, it is impossible that she can consent to any thing that can, in the least degree, impair it. The subsisting treaties, must have, in this respect, their full and complete execution. It expects, in consequence, on the part of the court of Petersburg, that it will withdraw

the orders it may have given to the commanders of its vessels relative to the Swedish commerce."

The Swedish government, in like manner replied to England; "That they had too high an idea of the sentiments of his Britannic majesty towards Sweden, not to believe that he would cause the existing treaties to be observed; that Sweden, on her part, would not fail in the performance of her duties."

26. The declaration, made by Russia to Sweden, the 30th July, 1793, as to the sending of a squadron of twenty-five ships of the line and some frigates, to cruise in the Baltic and North seas, was also made known, at the same time, by the court of St. Petersburg to that of Denmark, which, on the 23d of August, 1793, returned the following answer:

"That his majesty could not of course guess the meaning of a declaration which no way concerned Denmark, nor of a proceeding which applied the principles and rights of blockade to situations which precluded every idea of that kind; that the restricted commerce in grains, as it now subsisted, was a thing quite insignificant to the cause which the empress had espoused; but it was not so to Denmark, because it involved a sacrifice of her rights, her independence, and her treaties, which she meant to maintain; that his majesty would refrain from entering into a more serious examination of this subject,

It is not allowable to starve or blockade a whole nation.

since the empress had thought proper to reject the only judge whom his majesty could acknowledge, namely, *the common law of nations.*"

27. To form a treaty of famine against a whole nation, to attempt to starve women, children, old men, &c; a measure so monstrous was reserved for England first to introduce. Future generations will load with benedictions M. Bernstoff, the Danish minister, who had the courage to oppose such a system, while the English minister will be devoted to reproach and ignominy.

28. A neutral power fulfils its duties, when it does not deviate from a strict impartiality, nor from the meaning of established treaties. The question, whether its neutrality is more favourable to one of the belligerents than to the other, is foreign to its consideration, and is not to be regarded; otherwise, the momentary interest of one of the parties would become the interpreter and arbiter of existing treaties.

29. Though it may be allowable to starve a blockaded port, it is not permitted to extend this evil to other ports, when the misfortune will fall on the innocent, and on whole provinces of France, who have not merited this increase of misery, either from England or its allies. In the year 1709, France was much nearer a famine than she is at the present day; and yet England did not then reason

In 1709, Great-Britain protested against the attempt to starve Sweden.

in the same manner. Besides, when, afterwards, the king of Denmark, Frederick IV, on account of the war, then carried on by him against Sweden, which, like France, has, at all times, need of foreign provisions, wished to turn the same instrument of famine against his enemy, and to prevent importations into Sweden, in order to compel her to make peace, all the powers, and *particularly* GREAT-BRITAIN, protested against this claim, and unanimously declared it unprecedented and unwarrantable; and the Danish government, better advised, was obliged to desist from the measure.

ARTICLE III.

Of the Right of Belligerents to limit the passive commerce of Neutrals.

§ 1. AS, according to the system of the natural liberty of nations, it is only by their full and free consent that they can renounce the exercise of their natural rights in whatever may concern their particular interests, and is not prejudicial to others; so, in the system of the universal law of nations, it is only by some agreement, express or implied, that a nation can be under any obligation to refrain from selling its commodities to whom it pleases on its own territory; provided, it preserve as to the sale the same equality and impartiality towards belligerents as before the war, agreeably to the definition which has been given of neutrality.

Exceptions as to contraband, &c. derived only from the conventional law.

2. Thus the exceptions made, in all wars, by belligerents, to the exercise of the rights of neutrals, by prohibiting their commerce in certain articles, though the necessity of their own defence may require it, ought to be regarded as a matter of free and voluntary consent, resulting from the conventional law of Europe, and not, in the least, from the law of nature and nations, which lays no restraint on the commerce of neutrals. It follows, that the goods called contraband of war, such as arms, and other warlike stores, are not contraband by force of the law of neutrality, or in consequence of the universal law of nations, but by virtue of some convention merely, or, at least, of a renunciation of the natural rights of those who are specifically bound, or by virtue of a tacit consent, or acquiescence, in the practice of the majority of nations, on the part of those who have made no convention on the subject.(56)

3. If by the universal law of nations, neutrals who

(56) This theory is supported by Galliani, page 308. "I say, then, that it is not a rigid obligation of justice, for those neutrals who are not bound by any express article of some treaty, to refrain from furnishing articles contraband of war to the belligerents, because, though even one of them should have the full and perfect right to oppose this commerce between two sovereigns equally free and independent, the full right of the one imports no diminution of the right of the other. In regard to neutrals, the renunciation of their rights, with a view to procure a greater advantage to one or more of the belligerents, can be only a duty of equity, and not a strict, absolute duty."

The passive commerce of neutrals with belligerents is lawful.

are in possession of an active commerce with the belligerents, may impartially carry to one of them every kind of merchandise, even contraband of war; by the same principle of reason, the sale on their own territory ought to be permitted, if there existed before the war, a passive commerce with the belligerents. Thus, all passive commerce, or an impartial sale on its own territory, of merchandise, and manufactured articles of every kind, is always allowed to a neutral nation, whenever its sovereign has made no treaty to the contrary with any of the belligerents whose subjects come to purchase or provide themselves with such articles in the neutral territory, and when he does not interfere with the purchases, sales, and other contracts for the tranfer of property. As long as he does not fill his magazines with warlike stores, nor send vessels to transport them to the territories of the belligerents; as long as he confines himself to protecting the general commerce of his dominions, and securing its subjects, in the same manner, and with the same freedom, as before the war, he merely exercises the undeniable rights which belong to him, and which can be restrained only by conventions express or implied.(57)

(57) *Et quia neutrius partis esse debet, et à bello omninò abstinere, neutri etiam suppeditabit quæ directe ad bellum referuntur. Suppeditare hic loci transvehere ad alterutrum hostem significat; nam si qua gens instrumenta bellica, et cætera supra memorata utrisque bellantibus æquo pretio veluti merces vendat, neutralitatem non violat..... Ad hanc necessariam mercaturæ distinctionem*

Venice allows salt-petre to be supplied to Spain while at war with France.

4. The allied kings of France and Spain, Louis XII. and Ferdinand the Catholic, seized on the kingdom of Naples, at the beginning of the sixteenth century. Their different interests prevented their agreeing on the manner of disposing of their conquest. It became necessary to decide their dispute by arms; but the Spaniards were soon reduced to extremity. They were in want of every thing, and particularly of money, provisions, and ammunition. Their indigence was in some measure supplied by the senate of Venice, who were so indulgent as not to prohibit the exportation of salt-petre from the territories of the republic, for the use of Spain. The king of France made complaints to the senate, who, convinced of the right they possessed, in virtue of the principles which have been just laid down, answered, that what had been done, was in the way of commerce, and without their sanction, and that Venice being a free city, all its citizens were allowed to carry on any trade whatever, and that they could put no restraint on their speculations.(58) In this

animum non advertisse eos, qui de hac re tam prolixe scripserunt, manifeste patet; maxime enim inter se differre videntur exportatio mercium ad hostem meum ab amico vel neutro populo facta, et eorum venditio quæ ad bellum necessaria esse possunt. Lampredi, *Theorem. juris publici universalis*, p. 3, cap. 12, § 9, n. 4, et in notis.

(58) Guicciardini, *Storia delle guerre d'Italia*, lib. 5, p. 145, edit. 1587. "Et trovandosi molto inferiore di gente Consalvo, si ridusse coll' esercito in Barletta, senza danari con poca vettovaglia, et carestia di munitioni, benchè questo fu alquanto sollevato

manner these prudent senators, by making a distinction between their own ordinances and the operations of merchants, maintained the liberty of their commerce, even in time of war, and without exception of any species of merchandise.

5. Notwithstanding the certainty of this fundamental principle, Galliani, who has been so often cited, is desirous of establishing a theory, directly opposite, forgetting that he thereby contradicted himself on every other point.

6. After having justly remarked, page 111, that neutrality is not a change, but a continuation of a former state, and at page 142, "that the state of neutrality is not, nor can be, a new state, but a continuation of a former one, by the sovereign that has no wish to change it," he concludes, to the astonishment of every man of good sense, that neutrals cannot sell, to belligerents, on their own territory, arms, instruments, and other warlike stores, as they might have done before the war. But if war, as he has said, produce no change in the previous state of a neutral nation; if it do not destroy the rights it

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pu tacito consenso del Senato Venitiano, il quale non proibì, che in Vinetia facesse comperare molti salnitri, di che querandosi il re di Francia, risponderano essere fatto senza saputa loro, da mercanti privati et che in Vinetia, citta libera, non era mai stato victato ad alcuno, che non esercitasse le sue negotiationi, et i suoi commertii."

Galliani led into error by his love of controversy.

possessed in time of peace, for what reason, I ask M. Galliani, ought it to abstain from continuing its commerce? Why should it be obliged to change its state, when, according to his own principles, it ought to experience no alteration in consequence of neutrality? Why, in short, may it not offer for sale, in one of its ports, a vessel fit for navigation, and armed for war?—In his work, I discover no cause for all this contradiction, except the confusion which prevails in it, and the error into which he has been led, by the spirit of party, and a desire to refute Lampredi, who maintains a contrary opinion. This is the cause why he has obscured the truth by so many artful sophisms and ingenious paralogisms. It is, therefore, necessary to repeat, in this place, the incontrovertible principle by which neutrals, in virtue of the conventional law of Europe, are forbidden to carry to belligerents, things adapted for warlike purposes; and by which they are allowed, according to the universal law of nations, to sell them as merchandise, within their own territory, to any person who offers to purchase them; provided this be done with impartiality, and without favouring one belligerent party more than another. So true, in this respect, is this doctrine, that Galliani himself, could not help laying down, afterwards, page 312, the very contrary to what he had already said before. "But if the physical state of the climate, the productions, or manufactures of a nation, be such, that it draws its wealth principally from the commerce carried on and war, (if, for example, it has many

" mines of iron and sulphur, if its soil abounds with " nitre, or is covered with vast forests of resinous " trees, suitable for naval purposes, if hemp be one " of the chief branches of its agriculture, if it has " numerous founderies for arms) it will not, assured- " ly, be obliged to acquiesce in such a demand of " one of the belligerents, who ought to be satisfied " with the impartiality of the vendors."

7. Let us follow these two celebrated publicists, in their dispute. Lampredi,(59) willing to revenge himself on Galliani, reproaches him for having inculcated a false doctrine,(60) in saying, that a neutral prince might, without violating the laws of neutrality, allow the belligerents to raise recruits and enlist men in his own territories, to fill up and reinforce their respective armies, and for attempting to justify this maxim by the reason, that the laws of neutrality are not violated, when there is no particular treaty; or when the prince does no more than recognise and guarantee the conditions of a treaty already concluded, without making levies himself, without regulating the contracts, and without exposing, by any act, his sovereign power.

8. Lampredi attempts to refute this doctrine of his adversary in the following manner: " If a neu-

(59) Page 74, &c.

(60) Page 328.

" tral nation may permit, without partiality, the bel-
" ligerent parties to make levies of men in his terri-
" tories, for the use of their armies, why may he not
" also allow them to supply themselves with arms,
" and other military stores? Will it be said, that
" powder is an instrument more proper and more
" directly suited for the purposes of war, than the
" soldier who makes use of it to kill his enemies?
" That a cannon or a musket, instruments absolute-
" ly passive, are more destructive than the man who
" uses them to destroy cities and their inhabitants?"

9. To what degree will not the spirit of revenge and of party obscure the reason of the most enlightened men? Galliani, for the sake of combating the doctrine of Lampredi, goes so far as to contradict himself; the latter, in revenge for this, detaches a a single passage of Galliani from the chapter that follows, where in a more ample exposition of his subject, he returns to just principles, and leaves no doubt of his opinion, while the passage, thus cited, at first view, and without further examination, appears adverse to his own theory. But the principle opposed by Lampredi to the doctrine which he falsely attributes to Galliani, is not the less true, while the explanation given by the latter, a little further on, is a consequence of the opinion of them both. In page 329, Galliani thus expresses himself: " This is the true
" point of view in which such treaties ought to be
" considered. We shall, then, be persuaded that
" enlistments are always contraband of war, though

"the sovereign who leaves his subjects at liberty to "enlist, does not violate his neutrality, if it be the "settled usage of the nation, existing in time of "peace as well as in time of war; if its physical and "political constitution be such; if, in short, he ob- "serve, in this respect, a fair impartiality, by not re- "fusing to one what he grants to the other. If, on "the contrary, the sovereign had never given his "subjects permission to enlist in the service of for- "eign powers, by land or sea, I should be very much "at a loss to determine,* whether he might begin "the practice while two nations, his friends, are at "war. In vain might it be said, that he offered the "same advantage and the same indulgence to both; "the wants of the two nations might be so unequal, "that while one, on account of the scarcity of men "in the place, would derive an important and pow- "erful aid from this permission, it would be super- "fluous, and of no use to the other. For this rea- "son, it appears to be much better to apply the "general theory of the essential duties of neutrality "to this case; which is, that we ought to continue "in the same state and the same practices that "existed before the war, without allowing any inno- "vation whatever."

10. I pass over in silence other disputes of these two writers, about the words *to furnish, to transport, and to sell*, which I consider as mere grammatical inquiries.

* For myself, I should have no doubt on the subject.—(*Azuni.*)

Neutrals may sell to belligerents any goods in the way of commerce.

I shall content myself with observing, that, according to the principles above established, and agreeably to the theory of Lampredi, the restriction of the commerce in goods called contraband of war, cannot be derived from the universal law of nations, but only from the conventional law of Europe, as has been clearly laid down by Bynkershoek.(61) Though it be true, that a nation would be wanting in that impartiality which constitutes the essential feature of neutrality and the sole duty of neutrals, by furnishing to one of the belligerent powers, under the name of aids and succours, not only goods contraband of war, but any articles whatever useful and serviceable in war, it would be otherwise when these things were furnished merely in the way of commerce, especially, when it is considered, that contraband articles expose neutrals to seizure and confiscation by virtue of the various stipulations contained in treaties.

11. It is, then, clearly proved, that impartiality of commerce is the sole duty of neutrals towards belligerents, that is to say, they may continue their

(61) *Jus gentium commune in hanc rem non aliunde licet discere quam ex ratione et usu. Ratio jubet, ut duobus invicem hostibus, sed mihi amicis, æque amicus sim; usus intelligitur, ex perpetua quodammodo paciscendi edicendique consuetudine; pactis enim principes sæpe id egerunt in casum belli, sæpe etiam edictis contra quoscunque, flagrante bello. Dixi ex quodammodo consuetudine; quia unum forte alterumque pactum quod a consuetudine recedit, jus gentium non mutat.* Questiones Juris Publici, lib. 1, cap. 10.

commerce on the same footing as it stood before the war; and that the restrictions which have been laid on the independence and freedom of commercial intercourse, depend solely on those conventions, express or tacit, which constitute the conventional law of Europe. If, as Galliani affirms, neutrals be permitted to transport and sell to nations at war, every kind of merchandise, for a stronger reason, are they permitted to sell them with impartiality in their own territories, according to the opinion above given, and the doctrine of Lampredi.(62)

ARTICLE IV.

Of the Conventional Law of Europe, in regard to the commerce of Neutrals in time of war.

§ 1. THE restrictions imposed by the conventional law of Europe on the commerce of neutrals in time of war, have never had in view, properly speaking, the exact nature of the goods called, at the present day, contraband of war, but rather the concurrence of two circumstances which give them that character, one of which results from the positive fact of the neutral's carrying the goods to an enemy with evident partiality on his part, or the direct means taken to secure their transportation; the other circumstance consists in the sending the goods

(62) See note (57), *ante*.

out of the neutral territory with all the specific directions which mark their destination to the enemy. In that case only, if they should be met with on the point of entering the possessions of the enemy, they become contraband and good prize;(63) not because they are warlike instruments or military stores, but because they belong to the enemy, or it is sufficiently evident, that they are destined to pass into the hands and augment the forces of the enemy. The flag, whatever it may be, cannot protect them.(64)

2. The emperor of Russia adheres to this luminous principle; and to prevent arbitrary interpretations, and to fix in a positive manner what constituted a state of blockade, he determined that it should be precisely defined in the 3d article of the treaty of the $\frac{1}{17}$ of June, 1801, made with the court of

(63) *Res non hostium non bene capiuntur alibi.* Albericus Gentilis, *de Jure Belli*, lib. 2, cap. 22.

(64) Hutchinson's *Moral Philosophy*, Vol. 2, book 3, chap. 10, n. 2, page 360. "Military stores ..... ordinarily are to be sent to neither." See Wolfius, *de Jure Gentium*, cap. 6, § 184 et 678. Vattel, *Droit des Gens*, liv. 3, ch. 7. The maxim on this point established in the regulation concerning the armed neutrality, published, in 1780, by the empress of Russia, to which all the maritime powers of Europe, and the United States of America, acceded, is worthy of attention. The 3d article declares, "that, in order to determine what constitutes a blockaded port, that only shall be so denominated, where, by the disposition of the attacking power, with vessels stationed and so near, that there is evident danger in entering the port."

London, agreeably to the law of the armed neutrality in 1780. The spirit of these two treaties is, that, under the general denomination of goods furnished to an enemy, provisions ought not to be comprehended, unless destined for a place actually besieged or blockaded, as in that case it would enable the enemy to prolong, and even to raise the siege, to the great prejudice of the besiegers. For this reason, the transportation of provisions was very strictly prohibited by the treaty between Spain and the emperor, in 1725. In that treaty is specified the case when a place or port is to be considered as in a state of blockade: it is, when the port is so shut by two ships of war at least, or when the place is so incommoded by a battery of the enemy, that it cannot be entered without a manifest exposure to the fire of the besiegers. Such is the spirit of the 12th article of the convention between the French republic and the United States of America, of the 30th of September, 1800, in which the contracting parties have fully determined the point, by the following expressions, "unless these ports or places be actually blockaded, besieged, or invested."(65)

(65) England was never pleased with this rule concerning blockaded places; she has always rejected it, because it opposed the principles of her own system. Her court of admiralty, in its decree, in 1778, on the capture of several Dutch ships, which were bound to Rochfort, a port not blockaded, laid down this principle, *that every vessel sailing towards a port blockaded, was liable to confiscation;* consequently, the ports of France, by their natural

* An article is not contraband, merely because it is fit for war.

3. From this incontestible principle is derived another equally certain; that because an article is specifically suited for war, we are not to conclude from that circumstance, without further examination, that it ought to be considered as contraband, and that belligerents have a right to pursue and sieze it wherever it can be found. The natural law, which is the basis of the universal law of nations, does not give to a belligerent the right of entering with an armed force, into the territories of pacific nations, and, to imagine that he can become, by that means, the lawful master of all the warlike stores deposited in public or private magazines, without regard to the property, liberty, and independence

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position, being in a state of blockade by the English, the seizure of those vessels was lawful. According to this law, as absurd as it is atrocious, the British government, whenever it sent a fleet to sea, pretended to have blockaded the whole kingdom of France. On a similar pretext, it supposed that it might prohibit neutrals from all commerce with the country which it thus pronounced to be in a state of blockade, though no blockade, in fact, was intended. What folly!*

* For the English law on the subject of blockade, as laid down by Sir Wm. Scott, in the British High Court of Admiralty, see Robinson's Admiralty Reports, Vol. I, p. 87, 94, 152, 171, 332, Vol. II. p. 112, 129, 130; 298, Vol. III. p. 296, 336, Vol. IV. 64, 83, 89, 94. Brown's Civil and Admiralty Law, Vol. II. p. 314—319. In cases of insurance, where the question of blockade has arisen, our courts have decided, that nothing but an actual blockade, existing in fact at the time, can lawfully prevent neutrals from entering a belligerent port. See Cases in the Court of Errors in the State of New-York, by G. Caines, p. viii, and Cases in the Supreme Court of New-York, Vol. II. p. 1.....T.

Military stores are not contraband while on the neutral territory.

of nations, or to the supreme authority of the sovereign. As long as the articles of powder, shot, or cannon, or any other military stores remain on neutral and peaceful ground, they differ, in no respect, from any other articles of commerce. They may be sold, exchanged, and purchased, at pleasure, without violating the rights of any person. The prohibition, therefore, of commerce in goods reputed contraband of war, by the conventional law of Europe, extends to the precise case only of their direct and immediate transportation to the enemy's country, and not to the case of an impartial sale of them within the territory and ports of pacific and neutral nations, since, while there, they neither are, nor can be deemed, contraband.

4. These principles escaped the attention of the celebrated Galliani. In the course of his controversies concerning the doctrine of Lampredi, he boldly affirms the opinion of this publicist to be an innovation, contrary to the letter and spirit of every treaty, and to the universal practice and opinion of the world.(66) Lampredi has so successfully criticised this answer,(67) that it would be useless, in this place, to point out the confusion in the reasoning of Galliani, and the error into which he has

(66) Galliani, in the work cited, p. 388 and 389.

(67) See Lampredi, *del Commercio de Popoli Neutrali in tempo di guerra*, § 6.

The falsity of the doctrine of Galliani is proveable from history.

fallen, in his theory concerning the prohibition of the sale of contraband goods within the neutral territory; a theory which he supports by a coarse argument, drawn from the sale of wine and oil usually carried on in the shops and taverns of the city of Naples. To prove incontestably the falsity of the assertion of this writer, I shall confine myself to an examination of all the public treaties which form the conventional law of Europe, and give a concise history of its origin and progress. This examination will prove, that these restrictions and prohibitions have never existed, except in relation to the transportation of contraband goods, by neutrals to belligerents. It was intended, by means of treaties, to preserve and regulate the liberty of navigation and maritime commerce, and, particularly, to determine the legality of the captures which might be made of neutrals in time of war; but in no treaty is there to be found any prohibition concerning sales made by neutral nations within their own territory, where no merchandise can, absolutely speaking, be contraband, and where no prize can be made without violating the sacred rights of neutrality.

5. If we consult ancient history, from the first commencement of maritime wars, as to the principles and conduct of belligerents relative to the navigation and commerce of pacific and neutral nations, we shall find no example analogous to the present subject, except some acts of violence by the Carthaginians and Romans, who had no uniform

Conduct of the ancients towards neutrals who supplied their enemies.

and invariable practice on this point, though the *law of the strongest* had ever been the rule of their conduct. This law they abused so far as to prohibit their friends from all commerce with hostile or besieged places. We read in Polybius,(68) that some mariners having carried provisions to Africa, to the enemies of Carthage, were seized, and owed their liberation to the urgent solicitations of the Roman senate. Plutarch relates, that when Demetrius Poliocertes besieged Athens, which he wished to take by famine, he siezed a foreign vessel, laden with provisions, that was steering towards the harbour of that city; and the captain and pilot, by his order, were put to death.(69) The same author informs us, that Pompey, in the war against Mithridates, king of Pontus, sent vessels to cruise in the Thracian Bosphorus, to intercept pro-

(68) Polybius, *Hist.* lib. I, cap. vi.—"Some persons sailing from the ports of Italy to Africa, had conveyed supplies to the camp of the mercenaries. The Carthaginians seized on these, in number about five hundred, and threw them into prison. The Romans were greatly offended at this proceeding, but the men were all immediately released again at the first demand." *Hampton's Translation,* Vol. I. p. 142.

(69) Plutarch, *in Demetri.* "After this, Demetrius invaded Africa again, took Eleusis and Chamnus, and ravaged the country. Happening to take a ship loaded with wheat, which was bound for Athens, he hanged both the merchant and the pilot. This alarmed other merchants so much, that they forbore attempting any thing of that kind, so that a famine ensued." *Langhorne's Translation,* Vol. V. p. 144.

By the law of Rome, to supply its enemies was high treason.

visions, and he threatened with death whoever dared to navigate that sea.(70)

6. To supply its enemies with arms, horses, money, or whatever might be necessary to them, was high treason, according to the laws of Rome.(71) Hence the emperors, Valens and Gratian, forbade their subjects, to sell to foreigners and to barbarians, harness, bucklers, bows, arrows, swords, and every other kind of arms ;(72) a prohibition which, at that time, could concern only the Romans, and the sub-

(70) Plutarch, *in Pomp.* "He ordered a number of ships to cruise, and prevent any vessels from entering the Bosphorus with provisions; and that death should be the punishment for such as were taken in the attempt." *Langhorne's Translation*, Vol. IV. p. 82.

(71) L. 4, Dig. lib. 48, tit. 4. *ad Leg. Jul. Majest. Cujusve opera dolo malo hostes populi Romani commeatu, armis, telis, equis, pecunia, aliave qua re adjuti erunt, &c.*

See law 11, Dig. lib. 39, tit. 41, *de Publ. et Vectigalibus.*

(72) L. 1, Code, lib. 4, tit. 41, *Quæ Res export. non debeant.— Ad barbaricum transferendi vini, olei, liquaminis nullam quisque habet facultatem, nec gustus quidem causa aut usus commerciorum.* L. 2, ibid. *Nemo alienigenis barbaris cujuscumque gentis ad hanc urbem sacritissimam sub legationis specie, vel sub quocumque alio colore venientibus, aut in diversis aliis civitatibus loricas, scuta, et arcus, sagittas et spathas et gladios, vel alterius cujuscumque generis arma audeat venundare: nulla prorsus iisdem tela, nihil penitus ferri, vel facti jam, vel adhuc infecti ab aliquo distrahatur.* See Cod. lib. 12, tit. 45, *de Litoribus et Itinaribus Custodia.* Loccenius, *de Jure Maritimo*, lib. 1, cap. 4, n. 9.

The Roman pontiffs arrogate the power of prohibiting neutral commerce.

jects of the empire: but, in the lapse of ages, the Roman pontiffs, having arrogated to themselves universal sovereignty, Pope Alexander III, in the time of the crusades, solemnly prohibited the transportation of arms, iron, and timber suitable for the construction of gallies, to the infidels and Saracens, who were the enemies of the christian name, under pain of excommunication, forfeiture, and loss of liberty.(73)

7. This general law was considered, at that time, as obligatory on all the christians of the Latin church. It was renewed, afterwards, by Innocent III, Clement V, and some of his successors.(74) Nicholas V, and Calixtus III, put it in force, at the time the Portuguese, under Alphonso V, discovered Guinea, and several other unknown countries in Africa. By their bulls, in 1454, and in 1455, they prohibited the supplying the inhabitants of those countries, (whom they treated as infidels) with iron, arms, ship-timber, and other means of defence, under pain of excommunication of the individuals, and of an interdict of the nations or cities who should contravene these orders. (75) After the example of the Roman pontiffs, the

(73) C. 6, *de Judæis.*

(74) C. 2, *Extravag. Com.* Cod. Gonzales Telles, *Commentaria in decretal.* ad tit. *de Judæis.*

(75) Raynald, *Bull. in Cont. Annal. Baronii*, t. 18, ad an. 1454, n. 8 et 9, et ad an. 1455, n. 7 et 9.

sovereigns of Europe prohibited, during their wars, neutral nations from transporting certain goods to their armies, but under milder penalties in fact, since the offenders incurred only a forfeiture of the prohibited goods.

8. About the middle of the christian era, the commerce of the Mediterranean was exposed to the hostilities and piracies which the Saracens of the coast of Africa, continually carried on in that sea. (76) The emperor Ferdinand II, in 1250, in quality

(76) While, after the example of the Saracens, the inhabitants of the coasts of the Mediterranean infested that sea with their robberies, the Normans covered the northern seas and the Baltic with their piracies. During the state of anarchy, into which Europe, from this period, was for a long time plunged, the principle that the right of making war belongs only to the sovereign power of a state, was forgotten. The abuse of the feudal system, by limiting the duties of powerful vassals almost to fealty alone, so often violated, favoured the private wars of individuals even against their own countrymen; of which a multitude of instances may be found in the history of the middle ages. As long as these private wars were publicly tolerated, it is not surprising to see the subject of one state prosecuting his rights against the subjects of a foreign nation by every act of violence, without waiting for the special permission of his sovereign, even when the two governments were at peace. We find, besides, treaties, in which this right is clearly recognised. Such are the truces between France and England, in 1228, and 1235, couched in the following terms; *Quod si infra duos menses postquam forisfactum eis (subditis) constiterit, emendatum non fuerit, ex tunc ille cui forisfactum fuerit poterit currere super forisfactorem suum, donec plenarie fuerit emendatum, et nos sine nos mesfacere poterimus juvare hominem nostrum contra male-*

of king of Sicily, made a treaty of peace with Abuissac, king of the Saracens, by virtue of which each party was bound to respect the subjects of the other, and not to attack, in any manner, their maritime commerce.(77) In the following ages, the northern coast of Africa was divided into several small states, that took the name of their chief towns, as Tunis, Algiers, Tripoli, and Sallee, subject, at the present day, to the emperor of Morocco. These states successively usurped a kind of empire over the Mediterranean sea, by the continual depredations which they exercised indiscriminately against every nation that ventured to carry on any trade to the Levant, seizing their vessels, and reducing their crews to slavery. The European nations, after some unfortunate attempts for that purpose, perceiving the difficulty of subduing these pirates, found themselves compelled, in order to secure the liberty of their respective subjects, to treat with these barbarians, and to grant them, under the name of presents, an annual tribute. It is on these terms that the French, the English, the Dutch, the Danes, the Swedes, the Venetians, the Ragusans, and the Spaniards, continue to carry on a trade to the Levant, and along the coasts of Barbary. Other nations, who would not

factorem. Dumont, *Corps diplomatique,* tom. part. 1, p. 166 et 389. The same passage is found repeated in the truces of 1238, ib. p. 182, and of 1226, ib. p. 368.

(77) Leibnitz, *Cod. Jur. Gent. diplom.* n. 10, p. 13. Dumont, *Corps diplom.* tom. 1, part. 1, p. 168.

submit to such a hard law, have been always at war with these pirates, and continually exposed to their attacks in the Mediterranean.

9. After the example of the Barbary powers, the odious practice of piracy and privateering infested every sea. Even navigable rivers were not secure from these robberies. This gave rise to the numerous treaties of navigation and commerce, among the powers of Europe, mutually to guarantee the safety of their subjects, their vessels, and goods, wherever they might be found. Such were the treaties concluded in 1351, between the king of England, Edward III, and the maritime cities of Castile and Biscay; and, in 1353, between the Portuguese cities of Lisbon and Oporto.(78) Another treaty was made the 10th March, 1406, between Henry IV, king of England, and John, surnamed *Sans Peren*, duke of Burgundy, and count of Flanders, in which it was agreed, that the transportation of every kind of merchandise to one of the contracting parties, should be permitted during hostilities, with the exception of arms, cannon, other artillery, and articles of war.(79) This

(78) Rymer, *Fœder. Convent. et Act. publ.* Vol. 3, part. 3, p. 70 et 88.

(79) Dumont, tom. 2, page 302. "Item que ès vitailles, merchandises, et autres biens veniants des parties de l'oist vers le royalme d'Engleterre ou à Caleys, ou devers Flandres, par quelxconques personnes non enemies à l'une partie ou à l'autre, et quelxconques vaisseaux ils soient menez, ne sera par ceulx de l'une

As commerce increased, nations formed treaties to protect it.

treaty was afterwards confirmed by the same duke of Burgundy, and king Henry V, in 1417.(80)

10. Commerce, by degrees, civilised the nations of Europe. In their mutual intercourse, they began to act with more good faith, and with less of that jealousy, so prejudicial to the necessary relations that connected them together. We observe them giving freedom to maritime commerce in time of peace. But security vanished at the least appearance of war, and the merchant vessels of neutral nations, remained continually exposed to the violence and vexation of the belligerents. The powers who sought to render the commerce of their subjects flourishing, and to prevent these inconveniencies, found no better mode of attaining that object, than by mutually binding each other by treaties of commerce. These treaties turned on three principal points, which served as a rule for those subsequently formed, and have become, in some measure, the basis of the conventional law of Europe. 1. The designation of the duties on merchandise, and the privileges which the state, sometimes, granted to foreign merchants. 2. The exception of certain goods, the importation and exportation

partie ne de l'autre mis empeschement, ne desturbier en quelxconque manere; except armiers, artilleries, canons, et autres choses semblables et invasibles."

(80) Rymer, tom. 4, part. 3, page 12,

of which was to be prohibited. 3. The conditions by which the freedom of navigation and commerce was to be restricted, in case either of the contracting parties should be at war. Such have been the principal objects of these treaties for three centuries. In none of them is there any question made as to the passive sale of any goods whatever, not even of contraband articles. To prove this more fully, I shall proceed to cite these public acts, in succession.

11. The most ancient treaties of commerce contain no specific designation of goods called *contraband:* a denomination which comprehends arms, cannon, and all military stores. We find in them the general clause only, that neither of the contracting parties shall in any manner aid or assist the enemy of the other. The third article of the treaty of peace, of the 19th August, 1604, between Philip III, king of Spain, and James I, king of England, enumerates the contraband goods, the transportation of which to an enemy is prohibited; but it is silent as to the sale which may be made of such goods within their own territories. So is the treaty concluded the 5th April, 1614, between Gustavus Adolphus, king of Sweden, and the States-general of the United Provinces.(81) In the treaty of 1632, between France and England, for the re-establishment of commerce, mention is indeed made of prohibited

(81) Dumont, *Corps diplom*, tom. 5, part. art. 5, page 247.

Extent of contraband as found in early treaties.

goods, but in a vague manner only, without any particular enumeration.(82)

12. In the treaty made in 1642, between England and Portugal, arms and provisions are not declared contraband, except in the case only where they are exported immediately from ports and places in Portugal to Castile, at that time the enemy of England. (83) The same article was inserted, afterwards, in another convention, made between the same powers, in 1654.(84)

13. By a treaty of commerce, of the 18th August, 1646, between France and the United Provinces, it was agreed, that the Dutch flag should make free, not only the goods of the subjects of that republic, but all goods laden on board of their vessels, though belonging to an enemy, excepting, however, the articles declared contraband in the first article.(85) Spain, in her treaty of commerce, in 1647, with the Hanse-Towns, put no other restriction on the freedom of their commerce, than to prohibit the transportation of articles directly serviceable for war, to her enemies, and particularly to the United Provin-

(82) Dumont, tom. 6, part. 1, art. 3, page 33.

(83) Rymer, tom. 9, art. 2, page 90.

(84) Dumont, tom. 6, part. 2, art. 10, page 83.

(85) Dumont, tom. 6, part. 1, page 342.

ces of the Netherlands, with which she was at that time in a state of hostility.(86)

14. The maritime treaty of the 17th December, 1650, between Philip IV, king of Spain, and the United Provinces of Holland, gives a long enumeration of goods, called *contraband*, and allows the transportation of them to enemies in time of war, except to places blockaded, besieged, or invested.(87) Of the more recent treaties between Spain and Holland, those of 1676, and of 1714, contain the same articles.(88)

15. From the middle of the 17th century, we find in the diplomatic history of Europe, no treaty of commerce and navigation, which does not prohibit the transportation of arms, cannon, and other warlike stores, to the ports and cities of the enemies of the two contracting parties. In this prohibition, howe-

(86) Dumont, tom. 6, part. 1, art. 3, page 405.

(87) Dumont, tom. 5, part. 1, art. 4, 6, page 570. In article 6, we read as follows: "But under the name of contraband goods are not comprehended wheat, corn and other grains, salt, wine, oil, and generally, whatever is subservient to the nourishment and support of life; but they shall remain free, as all other goods not comprised in the preceding article, and they shall be allowed to be carried to the ports and places of the enemy, excepting cities and places besieged, blockaded, or invested."

(88) *Neve populus aut subditi alterutrius bona vetita, et prohibita in ea regna, dominia, vel territoria importent, quæ inimicitias vel hostilitates exercent.* Dumont, tom. 6, part. 2, page 103, et 122.

ver, no mention is made of the passive sale of these articles, nor does it extend to the transportation of grain, legumes, and other provisions, or innocent goods, except they are carried to places blockaded, besieged, or invested. The 7th article of the treaty of Westminster, dated the 5th April, 1654, between Holland and England, prohibits only the carrying of contraband goods to an enemy. We find the same provision, in the second article of the treaty of Upsal, of the 11th April, in the same year,(89) between Christina, queen of Sweden, and Cromwell; in the third article of the treaty, concluded at Paris, the 10th May, 1655, between Louis XIV, and the Hanse-Towns, and the 22d article of the treaty of Westminster, between France and England, signed the 3d November, of the same year.(90)

16. In the treaty of London, between England and Sweden, signed the 11th April, 1756, for the more full explanation of the 11th article of the treaty of 1654, above cited, there is no mention made of the

(89) *Cautum tantummodo sit interim nullas merces contrabandæ vocatas ad hostes alterius devehendas esse sine periculo, si ab altero fœderatorum deprehendantur, quod prædæ cedant sine spe restitutionis.*

(90) Art. 13. *Liberum præterea Belgarum fœderatorum populo ac permissum sit, præter merces omnigenas, arma etiam, res bellicas et annonam, tam ex fœderatarum Belgii provinciarum, quam ex aliis quibuscunque portubus ac terris in quascunque gentes transferre, tam inimicas regi regnoque Lusitaniæ, quàm amicas et fœderatas.*

sale of goods in their own territories, but only of the transportation of them to the enemy. The same spirit is to be seen in the treaty of the Pyrenees, of the 17th November, 1659, between France and Spain, the 11th article of which contains the same provision, that is to be found in the treaty of 1650, between the same powers. The stipulations concerning goods, the transportation of which is prohibited, and those in which a free trade is allowed, are precisely the same in both treaties.(91) The treaty of peace and alliance, concluded at the Hague, the 6th August, 1661, between Holland and Portugal, further declares, that the contracting parties might export to the enemy, goods of every kind, without excepting articles contraband of war.(92)

17. The treaty of alliance and friendship, of the 21st December, 1661, between Charles II, king of England, and Charles XI, king of Sweden, declares those articles only contraband, and good prize, which are carried to an enemy.(93) The 27th article of the

(91) Dumont, tom. 6, part. 2, page 265.

(92) See the last note but one (90).

(93) Dumont, tom. 6, part. 2, page 385. This treaty, which has served as a rule for a great number of successive treaties, is so worthy of observation, that we cannot forbear quoting the contents of the 11th article: *Subintelligi nullo modo debet, commercia navigationem, illi confœderato, ejusque subditis ac incolis, qui bello non est immixtus, eum hostibus illius confœderati, quin in bello versatur omnino denegata esse. Cautum tantummodo sit interim ne merces*

Treaties of commerce in 1662, 1666, and 1667.

treaty, signed at Paris, the 27th April, 1662, between France and the United Provinces, contains an agreement for the entire freedom of commerce, excepting only the transportation of goods generally prohibited; but without excluding the sale of them in the respective territories of the contracting parties.(94) In the treaty of Stockholm, of the 16th February, 1666, between Sweden and England, the transportation only, and not the sale, of contraband articles is prohibited.(95) That of the 31st July, 1667, between England and Holland, in detailing prohibited articles, makes no mention of the sale of them on neutral territory.(96)

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ullæ vocatæ contrabandæ, et specialiter nec pecunia, nec commeatus nec arma, bombardæ cum suis igniariis et aliis ad eas pertinentibus, ignes missiles, pulvis tormentarius, fornites, alibi lunten, *globi, cuspides, lanceæ, hastæ, bipennes, tormenta, tubi catapultarii, vulgò mortaria, inductiles sclopi, vulgò petardæ, glandes igniariæ missiles, vulgò granatæ, turcæ scloptariæ, bandoliers, sclopeti, globuli, seu pilæ quæ sclopetis jaculantur, cassides, galeæ, thoraces loricatæ, vulgò* cuirasses, *et similia armaturæ genera milites, equi, omnia ad instruendos equos necessaria sclopothecæ, ballhei, et quæcunque alia bellica instrumenta, uti nec naves bellicæ et præsidiariæ hostibus suppeditandæ devehatur ad alterius hostes sine periculo, si ab altero confederatorum deprehendantur, quod prædæ cedant absque spe restitutionis.*

(94) Art. 27. "Ce transport s'etendra à toutes sortes de merchandises, a l'exception de celles de contrabande."

(95) Art. 2. "They cannot be *carried* to the enemy of either party." Vol. 6, part 3, page 33.

(96) *Ne tamen interea in suspenso hæreant, et in ambiguo teneantur utriusque partis incolæ et subditi, incerti quas mercimonii species*

18. The treaty of commerce, of 1667, between Sweden and the United Provinces of Holland, merits some attention. It first gives an enumeration of prohibited goods; it then designates those, the transportation of which, was permitted. Of this number are silver coin, wheat, legumes, wine, oil, and other provisions; even iron, copper, brass, and every thing which enters into the construction and equipment of ships, as hemp, sail-cloth, tar, pitch, masts, spars, plank, cordage, and anchors; this was confirmed in the subsequent treaties, of 1675, and 1679.(97) But when war broke out between Holland and England, the former entered into special articles with Sweden, in which it was agreed, that during the continuance of hostilities, the latter should not carry to English ports any kind of merchandise, proper for the construction and equipment of ships of war.(98) Thus in her declaration of war against France, and afterwards, in a manifesto, which she published concerning the liberty of the navigation and commerce of neutrals, on the 9th March, 1669, Holland warned its friends, allies, and neutral states, not to attempt to

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in formam belli apparatus vel suppetiarum, aut sub titulo et pretextu commerciorum hosti partis alterius subvehere aut suppeditare, aut licitum aut vetitum sit, &c.

(97) Dumont, tom. 7, part. 1, page 87, art. 3 & 4, page 316 et 347.

(98) Dumont, tom. 7, page 38.

carry prohibited goods to the ports of the enemy.(99) The same clause,(100) is found in the 14th article of the treaty of Nimeguen, of the 24th September, 1678, between France and Holland, and also in the 12th article of the treaty of Copenhagen, of the 15th June, 1701.(101)

19. England and Holland, who have always aimed at universal commerce, made several treaties to prevent the difficulties which this rivalry could not fail to produce. The treaty of 1668, secures to the respective subjects of the two powers the liberty of commerce with the enemies of each other, with the exception of contraband goods, under which name was comprised all kinds of fire arms, powder, and every thing used for war; but it permitted the exportation of every kind of grain, legumes, and all kinds of provisions.—In another treaty of navigation and commerce, concluded in 1674, by which a free commerce in all sorts of merchandise, not contra-

(99) Dumont, tom. 7, part. 1, page 126, art. 3 et 4. "Il est defendu de transporter aucune merchandise de contrebande pour les conduire dans aucun hâvres et places de France, où autres états de l'obèissance dudit roi, étant dans l'intention de reputer de bonne prise, et confisquées les susdites marchandises, etc."

(100) "Ce transport et ce trafic s'entendront à toutes sortes de merchandises, à l'exception de celles de contrebande."

(101) "Ils ne porteront à nos enemis aucunes marchandises de contrabande, et ainsi *vice versa*." *Dumont*, tom. 8, part. 1, p. 82.

and commerce with their enemies, excepting always, goods contraband of war, such as all kinds of arms, and warlike stores, which are declared forfeited when carried to an enemy. Such are the treaties of commerce, between England and Denmark, in 1669 ;(109) between France and Sweden, in 1662 ;(110) between Denmark and the United Provinces, in 1701 ;(111) between Great-Britain and Sweden, in 1720 ;(112) between Great-Britain and Russia, in 1734, and 1736 ;(113) and between the king of Naples and Holland, in 1752.(114)

23. The rights and duties of belligerents and neutrals, laid down in the different treaties above-mentioned, which form, at present, the conventional law of Europe, have been recognised, also, in times nearer to us. The more modern treaties are founded on the same maxims as the ancient. Such are, the treaty of commerce between France and the United States of America, of the 6th February, 1778 ;(115)

(109) Dumont, tom. 7, part. 1, page 126.

(110) Ibid. page 166.

(111) Dumont, tom. 8, part. 1, page 32.

(112) Rousset, *Recueil* d'act. mem. et trait. tom. 2, p. 476.

(113) D'Eon de Beaumont, *(Les Loisirs,)* tom. 5, p. 324, 325.

(114) *Mercure historique et politique*, 1753, September, p. 244.

(115) Article 23. "It shall be lawful for all and singular the subjects of the most Christian king and the citizens, people and in-

the treaty of amity and commerce, between Holland and the United States of America ;(116) and another between the same states and Sweden, of the 3d April, 1783 ;(117) the treaty between the Ottoman Porte and Russia, after the conquest of the Crimea and Cuban ;(118) the maritime treaty between Russia and Denmark, signed at Copenhagen, the 28th June and the 9th July, 1780; the treaty of the 21st July, of the same year, between Russia and Sweden. Such, also, are the act of accession to the

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habitants of the said United States, to sail with their ships with all manner of liberty and security, without any distinction being made, who are the proprietors of the merchandise laden therein, from any port, to any place whatever, belonging to those who now are, or hereafter may be, at enmity with the most Christian king, or the United States. It shall, likewise, be lawful for the subjects, and inhabitants aforesaid, to sail with their ships and goods, and to trade with the same freedom and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy above-mentioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince, or under several."

(116) Art. 11 and 23.

(117) Article 6.

(118) Article 40. "When one of the contracting parties shall be at war with any foreign power whatever, the subjects of the other contracting party are not prohibited from carrying on their commerce with the enemy, and from frequenting his dominions, provided they do not carry to the enemy ammunition and warlike stores, &c."

A free passive sale of goods by neutrals, is universally allowed.

own territory. They have confined themselves to the threat of confiscating contraband articles which should be found clearly destined to the enemy.

25. It was this fundamental principle of the conventional law of Europe, and henceforth of the whole world, that dictated the declaration of Great-Britain against Spain, the 30th October, 1739, and that against France, the 9th April, 1744; that of France, of the 26th July, 1738, as well as the declaration of the armed neutrality by Russia, published at Czarsko-Zelo, the 8th May, 1780, to which the courts of London,* France, and Spain, who were then at war, by their formal answers, acceded. These declarations have served for the basis of the treaties just cited. The armed neutrality, as has been said, is a federative union of the naval forces of neutral powers, to repel, in time of war, acts of violence exercised by belligerents against the commerce and navigation of peaceful nations who wish to take no part in the war.

26. It has, sometimes happened, that a nation, either from motives of political prudence, or from fear of offending one of the belligerent parties, whose insults it was not in a situation to repel, has consented

* The answer of the court of London, can hardly be called an accession to this declaration; but the letter of Mr. Fox, the 4th May, 1782, to Mr. Simolin, contains an express offer to accept the principles of the armed neutrality as the *basis* of a treaty between England and Holland.....T.

The practice of a few states does not avail against the general practice.

to sacrifice its incontestible rights of commerce, by prohibiting, wholly or partially, the sale of warlike stores within its territory; but the example of a few feeble and unarmed nations, whom necessity compels to yield, and to prefer the temporary sacrifice of their commerce to a greater evil, proves nothing against the invariable and universal practice of Europe, continued for so many centuries. Galliani might have perceived as much, in spite of the restless jealousy which, amidst his various meditations on this subject, impelled him to contradict the opinion of Lampredi. On re-perusing the Code of the conventional law of Europe, even of the time in which he wrote, during the Anglo-American war, he would have seen, that the republic of Venice was the only one, who, by her declaration of neutrality, of the 9th September, 1779, absolutely prohibited the commerce in all articles contraband of war, within her own territory.(122) The edict of Naples, of the 19th September, 1778 ;(123) the manifesto of Ge-

(122) Art. 6. "We prohibit, in like manner, every Venetian navigator, and every other subject domiciliated, or even passing for a time, in our territories, to load there, with arms and ammunition directly fitted for war, for the countries or shipping of the belligerents, or to furnish any such articles to ships of war lying in the ports, bays, roads, or on the coasts of our dominions."

(123) Art. 2. "We prohibit, within all the places under our dominion, the sale, building, or arming, for the account of nations at war, of any privateer, or ship of the line, under the penalty of two thousand ducats for every offence..... Belligerents are, ne-

noa, of the 1st July, 1779;(124) the edict of Rome, of the 4th March, in the same year,(125) prohibit only the transportation of contraband goods, and the equipment of privateers within their respective territories. Sardinia and Ragusa, published no manifestoes, but they governed themselves more or less according to the same maxims, in proportion to the extent of their fears. Tuscany, always consistent with herself, ever firm in the maintenance of her rights, founded on the immutable basis of the law of nations, without possessing more forces than the other states of Italy, always allowed, in her ports, the impartial sale of every species of contraband goods. The declaration of neutrality, of the 1st August, 1778, only prohibits merchant vessels from furnishing themselves with more arms than were necessary.(126)

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vertheless, permitted to repair their vessels, and to purchase whatever is necessary for that purpose."

(124) Art. 7. "We absolutely forbid, as well our own subjects as all persons domiciliated, or resident within this city, or any other place within our dominions, to arm for privateering or for war, within the ports, gulfs, roads, or places under our government, any ships, vessels, or any other kind of square-sailed, latine, or row-boats, &c."

(125) "We expressly forbid all the subjects, inhabitants of the States of the Church, of every grade, rank, and condition, to sell, build, or arm, on account of the nations at war, any privateer, or ship of the line, or other vessel, either with sails or oars, &c."

(126) Art. 11. "The purchase of arms, powder, and military stores or provisions, will always be permitted to every person, and

Ordinance of Spain as to goods on board of enemy ships.

27. The ordinance of Spain, concerning privateers and cruisers, article 9, declares, that all ships laden with goods belonging to an enemy, and goods of the subjects of the Spanish crown, found on board of an enemy's ship, are good prize. D'Habreu, in commenting on this ordinance, thus expresses himself: (127) "This article, far from contradicting, confirms the treaties just cited, and gives them greater extension, since the treaties mention only the goods of foreigners, friends, or allies; and the ordinance speaks also of the goods of subjects of Spain, laden on board of an enemy's ships. This then is the true meaning of the ordinance: We are to consider as good prize, not only the goods of friends or allies, found on board of enemy's ships, but also the effects of Spanish subjects, which may be on board of the same ships, or under their flag. This case is expressly defined by the ordinance, in order to prevent the error into which we might fall, in supposing, that the king, by virtue of that protection which he owes to his subjects, meant to

for every kind of vessels, within the free port of Leghorn, where the trade in those things considered as merchandise, ever has been, and ought always to remain free, though they should even serve to supply privateers or ships of war. It is forbidden only to merchant ships to arm themselves, unless they give sufficient security to be answerable for their pacific intentions, as we have above directed."

(127) D'Habreu, *Tratado sobre las presas maritimas*, part. 1, ch. 8, § 7. See also the learned notes of M. Bonnemant, his translator.

disguise; there was not a paper on board of a ship in which they did not find defects; no goods, which were not deemed either the growth or manufacture of England, and the lading of which was not followed by confiscation of both vessel and cargo. According to the law of the 29th Ventose, in the year 6, (1798) as the directory of the republic, entitled it, in its message on the 13th January, 1799; "The right of pronouncing on the validity of prizes, was determined by an antiquated jurisprudence, imperfect, often contradictory, and which no authority in the republic could correct, or guide in its application."

30. Such was the state of things, when the decree of the consuls, of the 21st December, 1800, fixed the law on this subject, by adopting for its basis the preceding regulation of the 26th July, 1778, as the best adapted to reconcile the interests of the republic with the rights of neutral powers. The law of the 18th March, in the same year, took away from the civil tribunals the cognisance of prize causes; and by a law of the 30th March following, it was given to a special council established at Paris, under the name of the *council of prizes*. Notwithstanding the first article of the regulation of the 26th July, 1778, which explicitly allows neutrals to transport the goods of enemies in their own ships, this council, by virtue of the 7th article of the ordinance of the marine, have, by their decision of the 15th October, 1801, on the capture of the Danish ship *Lisefiord* by the privateer *L'Hercule*, declared

them to be good prize.(128) Yet since the treaty of peace of the 30th September, 1800, between the French republic and the United States of America, all the cargoes suspected, or even belonging to enemies on board of American vessels, have, by the decisions of the council, been released as well as the vessels, according to the 14th article of the treaty, though the United States renounced this privilege in favour of Great-Britain, by the 17th article of the treaty concluded at London, the 19th November, 1794. On combining the regulations of these two treaties, a difference results, which, in its effects, clearly weighs against France in case of war with England, and which so far restrains the freedom of the American commerce *.

(128) M. Bonnemant, the lawyer, who defended the privateer in this cause, in an excellent memoir presented on the subject, replied as to the first article of the regulation of 1778 above mentioned, which his adversary opposed to him, that it was conditional only, and, consequently, ought not to be adhered to, except in case of an exact reciprocity; it being admitted by all publicists, that neutrality ceases to be impartial when it is no longer relative. Such is the opinion of Hubner, *de la saisie des bâtimens neutres*, tom. 1, chap. 2, on which Mr. Bonnemant relies on this subject.

* All the articles of this treaty, except the first ten, have expired by express limitation. The 17th article admitted, that the goods of an enemy, found on board of the vessels of the United States, might be good prize; and thus abandoned the principle, that free ships make free goods. Our government, however, had expressly recognised the principle of that article as a part of the law of nations. See the letter of the Secretary of State to Mr. Genet, the 24th July 1793; and the letter of instructions to the Ame-

Free ships make free goods.—Treaties between Turkey and France.

31. From what has been said, it follows, as a principle, that all neutral nations ought to be at liberty to continue their commerce with belligerents in the same manner as before the war, excepting in contraband goods; that the transportation of enemy's property in neutral ships is no violation of the rights of belligerents; that this principle is recognised by nations the least civilised, as may be seen from the treaties of the 19th September, 1689, between France and the Ottoman Porte, renewed afterwards by the treaties of 1719, 1764, and the 29th March, 1790. All these treaties declare, that the Turkish, Algerine, or Tunisian flag, accompanied with passports to show the neutrality of the ship, protects the ships and goods of the enemy; in regard to the Turkish nation, no inquiry is made whether the ship belongs to an enemy, if it be commanded by an Ottoman captain, and be furnished with a passport; or if the goods belong to an enemy, the flag covers them, unless more than one third of the crew be composed of enemies, as was decided by the council of prizes on the 7th July, 1801, in favour of the Alge-

rican minister at Paris, dated the 26th August, 1793. If all nations would consent that the flag should protect the cargo, it would free the commerce of neutral and pacific nations from much embarrassment; but while the interests of the belligerent powers of Europe are so adverse to each other, there is little hope of its becoming a permanent rule in the universal Code of nations. Nor is it, in the opinion of many well-informed men, a doctrine for which the United States, considering the nature and progress of their commerce, ought very strenuously to contend....T.

rine ships, *La Madonna della Salute, et La Rachel.** "It results from this historical view of the laws," says the learned M. Portalis, in his opinion delivered in the council of prizes, the 25th July, 1800, relative to the capture of the ship *Statira*, "that they have "varied with the change of manners and circum- "stances; that the policy of the moment has almost "always modified the principles of political law; "that, in more modern times, the regulations appear "constantly to incline towards general equity; and "that the French nation, may claim the honour of "having been, during the last war, the first to in- "troduce the mild and generous maxims which "have prevailed, and to set an useful example to "all nations."

ARTICLE V.

Of Contraband of War.

§ 1. ALL restrictions on the independence and natural freedom of the commerce of pacific and neutral nations, in time of war, are founded solely on the conventional law of Europe, as has been shewn in the preceding pages, and not on the primitive law of nations. There is nothing in the universal law

* See the note of M. Bonnemant, in his translation of D'Habreu's *Tratado sobre las Presas*, part 1, ch. 9, p. 148. He was counsel for the captors in the case of the Rachel....T.

that prohibits the transportation of goods on the high sea, any more than the sale of them on the neutral territory, in the same manner as might have been done before the war. Thus the origin and designation of goods *contraband of war*, is to be ascribed solely to conventions express, or tacit, and not to the universal law of nations.

2. Galliani, so often cited, after having exhibited, chapter 9, § 4, the doctrine of the publicists from Grotius to Lampredi, concerning the specification of contraband articles, concludes with saying, that he had determined by the light of reason and good sense, (expressions his vanity rendered familiar) what kind of goods ought to be regarded as contraband of war: they are, he adds, with a very little difference, the same that are specified under that name in almost all the European treaties. He enumerates those articles which have been declared contraband, at all times, and in all places; he next proceeds to those, the commerce in which has always been free, and, lastly, he mentions those about which the question yet remains undecided. In the first class, he reckons men, horses, all kinds of arms, offensive and defensive, and vessels of war. In the second, he places provisions, articles of the first necessity, and whatever conduces to the luxury and comforts of life. In the third, are comprised such goods, the freedom or prohibition of which, has not yet been established by common consent, especially, metals, silver coin, minerals, hemp, tar, and ship-timber.

Contraband ascertained by treaties.—A few exceptions.

3. If the determination of what goods or articles are contraband of war, depend solely on the treaties of Europe, as Galliani, in the outset, wisely observes, it was quite useless to class all merchandise under three distinct heads, and, afterwards, to determine by a philosophical or chemical analysis of their nature, under what aspect they ought to be considered in time of war. In order to learn the most general practice of nations, would it not have been sufficient to refer to the conventional and voluntary law of nations, formed by the express or tacit agreements of the contracting parties?

4. From all the treaties, cited in the preceding article, for the purpose of refuting the error of this writer, and which constitute a part of the conventional law of Europe, it follows, that under the name of contraband are comprised those things only, which are of immediate and direct use in war, that is to say, for attack and defence, by sea and land. This principle has so far prevailed in public treaties, in times the most remote, that, during an interval of three centuries and an half, we with difficulty find a few treaties, allowing a free commerce in arms and warlike stores, and the transportation of them to an enemy, and they form an exception to the general rule introduced into the public conventional law of Europe. Such are the treaty of Westminter, between Edward IV, king of England, and Francis, duke of Brittany, of the 2d July, 1468; those of 1642, and 1654, between England and Portugal; that of 1647,

Variations have taken place in the designation of contraband.

between Spain and and the Hanse-Towns, and another between Alphonso, king of Portugal, and the United Provinces, signed at the Hague, the 6th August, 1661.(129)

5. The question of contraband of war, was not, however, uniformly established as to articles which in their natural state, did not serve directly for war, though human art and industry might adapt them to that purpose; such as salt-petre, sulphur, iron, lead, copper, hemp, sail-cloth, tar, pitch, ship-timber, masts, and objects of the like nature, as well as provisions, and money which has always been considered as the sinew of war. It will not be foreign from the subject to mark the variations which have taken place in this repect in the treaties of Europe.

6. The first act in the European diplomatic Code, that proscribes the transportation of eatables and money in time of war, as contraband goods, is the treaty of the 16th August, 1604, and, afterwards, the 9th and 18th articles of that of the 15th November, 1630, between Spain and France. Salt-petre was first placed among contraband articles, in the 6th article of the maritime treaty, concluded the 17th December, 1650, between Philip IV, king of Spain, and the United Provinces of the Low Countries. The same regulation as to provisions and money, again appears in the 8th article of the treaty of Westminster, made

(129) See the last article.

Particular treaties in which contraband goods are enumerated.

the 5th April, 1654, between Oliver Comwell and Holland.(130)

7. By the treaty of Paris, of the 10th May, 1655, between France and the Hanse-Towns, the commerce in grain and provisions with an enemy was declared free. The same regulation was adopted in the 13th article of the famous treaty of the Pyrenees, of the 17th November, 1659. Corn, wheat, barley, legumes, oil, wine, salt, and, generally, whatever served for the nourishment and support of life, were not comprised among *contraband* goods.

8. England and Sweden, by a treaty of alliance and friendship, of the 21st October, 1661, confirmed, afterwards, by that of the 16th February, 1667, placed silver coin and eatables in the class of prohibited articles; but this system was changed by those powers, in the 4th article of the treaty of commerce and navigation, dated at London, the 1st December, 1674, between Charles II, king of England, and the United Provinces, and in the treaty of Stockholm, of the 26th Novembr, 1675, between Charles XI, king of Sweden, and the United Provinces. In these treaties, they excepted from the number of contraband articles not only grain, provisions, and money, but also all crude metals, hemp, flax, pitch, cordage, sails, anchors, masts, plank, spars, and whatever serves for the building and repair of vessels, to the sustenance

(130) See the last article.

of man, and the comforts of life. This beneficent system was adopted by France, in the treaty of Utrecht with England, the 31st March, 1713. The 26th article declares, that cloths, and timber suitable for the building, refitting, and equipping of ships, should be no longer comprised in the number of *contraband goods*.

9. Notwithstanding the extension given to free goods by the last mentioned treaty, France, in her treaty of commerce with the Hanse-Towns, of the 28th September, 1716, excepted salt-petre, and declared it contraband. Philip V, king of Spain, and the emperor Charles VI, in the treaty of 1725, also prohibited ship-timber, sails, pitch, tar, and cordage.

10. To prevent all doubt, as to what goods ought or ought not to be deemed contraband of war, it was laid down as a principle, in the treaty of amity and commerce, made the 6th February, 1778, between France and the United States of America, that nothing should be reputed contraband, which had not the form of an instrument prepared for war, either by land or sea. We cannot help being surprised, however, that this treaty, and all others to the present day, and especially that of the armed neutrality proposed by Russia, and accepted by the greater part of the powers of Europe, in adopting the above designation of free goods, should have excluded salt-petre and sulphur, which have been always declared contraband, as in the treaties of 1734, and

1766, between England and Russia, and in the 18th article of the last treaty made between the United States of America and England, the 29th August, 1795; though, in their natural state, neither of those articles has any more the form of an instrument of war, than iron, copper, lead, anchors, ship-timber, the commerce in which is allowed, while in their natural state. By the 16th article of the last treaty of amity, limits, and navigation, between the United States of America and Spain, in 1795, all kinds of arms and their appurtenances, when ever they are fit and adapted to become instruments of war, are considered as contraband articles. Money, and all other articles which are not immediately fitted for military service, are deemed lawful, and ships of war have only a right to compel the merchant vessel laden with these articles to sell to them, on paying their full value, according to an estimate the most favourable to the owner.

11. To permit the transportation of every thing proper for the building and repairing of ships of war, as timber, iron, copper, anchors, and sails, articles without which a ship cannot be armed, nor any artillery, or arms for offence or defence be made, and to prohibit, at the same time, salt-petre and sulphur, without which they cannot make powder, is an evident contradiction. Salt-petre and sulphur ought to be reckoned among free goods, though they enter into the composition of powder; for, if the least relation to the numberless wants of an army or a fleet,

Those goods only, which are adapted for war, should be contraband.

be sufficient to give the name of *contraband*, and to render them prohibited, there would be no goods the commerce in which could be free.(131) On the contrary, there are none of the articles which seem most directly destined for warlike use, which are not, sometimes, employed for the most innocent purposes of pleasure or profit.(132)

12. By reflecting on the spirit of the public treaties which form the conventional law of Europe, it will be seen that they have universally established it as a maxim, that, under the name of *contraband of war*, are comprised those things only which are of direct and immediate use to an army, in active warfare. It appears to me, that the laws concerning *contraband of war* ought not to be extended beyond goods directly suited for offensive war. Every other claim on the part of belligerents would be unjust and cruel, and neutrals could not long endure a privation so little different from a state of slavery. Honesty and good faith alone ought to preside in determining facts, and in the comparison by which

(131) *Si omnem materiam prohibeas, ex quâ quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex qua non saltem aliquid bello aptum, bello facilè fabricemus.* Bynkershoek, *Quæstiones Juris Publici*, lib. 1, cap. 10.

(132) *Paucissima sunt belli instrumenta quæ non et extra bellum præbeant usum sui. Enses gestamus ornamenti causa, gladiis animadvertimus contra facinorosos, et ipso pulvere bellico utimur pro oblectamento et ad testandum publicè lætitiam.* Bynkershoek, ib.

the conduct of neutrals is to be reconciled with the duties imposed upon them by friendship and humanity. In my opinion, it is only in case of a violation of these duties, that belligerents can be authorised to chase vessels laden with goods destined to favour an enemy, or to confiscate or retain them in custody, without its being considered as a just cause of offence, and an insult committed against such neutral flag.

18. The marine ordinance of France, in the 11th article, title *des Prises*, under the name of *contraband of war*, designates only arms, powder, ball, and other warlike stores, horses and their equipage. A similar regulation had been already made by the forty-second article of the ordinance of 1543, and by the 69th article of that of 1584. For almost a century past, each power, according to its particular interest, has thought it right to comprise, under the denomination of *contraband of war*, a great number of things which have only an indirect relation to those articles of which an immediate use is made in war, and to circumscribe the commerce of neutrals in productions of their own growth or industry, according as the raw or manufactured article may serve to augment the force of the enemy. Hence, all nations have agreed to consider as contraband of war, powder, salt-petre, (which, however, is only of an indirect use) petards, matches, balls, bullets, bombs, hand-grenades, carcasses, pikes, halberts,

swords, belts, pistols, holsters, horse-saddles and harness, cannon, mortars with their carriages, and other arms and warlike utensils, for the use of troops, beyond what is necessary to equip a vessel for its own defence, and destined for an enemy. They afterwards included under this description, ship-timber, masts, tar, pitch, turpentine, sulphur, sails, cordage, and every thing which could serve for the armament of a vessel, even money, and, in certain cases, provisions.

14. English policy, that it may not endanger its own interest, classes in the predicament of *contraband*, besides the articles already specified, all such as may be determined by the English, as capable of augmenting the force of an enemy. With this rule of jurisprudence, they are certain never to miss their aim. England, able to carry on its commerce in time of war by means of convoys, may do without neutrals, whose commerce she is interested to restrain, by prohibiting the transportation of all those things which may augment the resources and strength of her enemy.

15. France, on the contrary, even at the period when she counterpoised the maritime power of England, always kept within the bounds of a just and equitable restriction; she has rarely transgressed this moderation, even when she might, without injustice, have made reprisals. This appears from her different treaties, and from the decisions of her tribu-

nals. It was decided by the council of prizes at Paris, the 4th April, 1801, in favour of the Danish ship *Elegance*, laden with masts for ships, recaptured from the English, that this article was *not contraband of war*; "and though, in contempt of trea-"ties," said the council, "the English confiscate "articles belonging to neutrals, and destined for "their enemies; this conduct so atrocious, auda-"ciously proclaimed by the ministerial party, ought "not to find imitators among governments who re-"spect the laws of nations."*

16. According to principles so opposite to each other, have the French and English governments formed their treaties with the United States of America. In that concluded between those states and Great-Britain, the 17th November, 1794, all goods of an indirect use in war, are regarded in nature of contraband; the 18th article excepts only bar-iron and fir planks. On the contrary, in that concluded

* On this subject we see no reason to extol the generosity of the French, on the one hand, or to reprobate the atrocity of the English on the other. Each government in making these commercial pacts or treaties, has been guided by the same motives which actuate two individual merchants, that is, by their respective interests. The whole of the historical detail in this article, and particularly the last treaties between England and Russia, and Russia and Sweden, show the influence of circumstances in the formation of these conventions. The principle contended for by M. Azuni, undoubtedly affords the only just and true rule, and it is to be wished, that all nations would take it as a guide in their commercial treaties....T.

between these states and France, the 30th September, 1800, those articles only are considered as contraband of war, which have the shape of an instrument proper for warlike use by land or sea, or for troops, and also powder and salt-petre. This principle of moderation, which, without infringing the rights of belligerents, secures the liberty of neutrals, was proclaimed as law by the convention of the armed neutrality of Russia, the 21st October, 1780. The salutary principle established in that convention has been recently admitted by England, in the treaty concluded with Russia, the 17th June, 1801, and by the 26th article of the treaty of alliance, of the 11th March, 1801, between Russia and Sweden.

CHAPTER III.

OF THE COLLISION BETWEEN THE RIGHTS OF BELLIGERENTS AND NEUTRALS.

ART. I.

Of the Conventional Law of Europe, as to the Capture of the Goods of an Enemy on board of a Neutral Ship.

§ 1. THE opinion, that every ship laden with goods belonging to enemies, though sailing under a neutral and friendly flag, might be confiscated by the belligerents, has long prevailed. It has been adopted in many marine ordinances, in different declarations concerning the navigation of neutrals in time of war, and by several publicists,(133) who have derived it from the Roman law, without considering that the application of this law to the present state of Europe, was contrary to the interests of nations.

(133) *Ordonnance de la Marine de France*, August, 1681, liv. 3, tit. 9, art. 7, *Comment.* D'Habreu, *Tratado sobre las Presas*, par. 1, cap. 8, p. 108, et sequen.

2. The Roman law, beyond all doubt, subjected to confication, prohibited goods and the vessel which carried them, as for an infraction of the law ;(134) but it is equally clear, that this was a matter of pure civil regulation,(135) obligatory only on the subjects of the legislator, and not on other and independent nations. In regard to their respective interests, nations are bound to observe only the law of nature; and this law, as has been shewn in the first and second articles of the preceding chapter, confers no other right than that of seizing and sequestering goods belonging to an enemy, in every place where any acts of jurisdiction and hostility may be lawfully exercised. It must be allowed, therefore, that writers, who have been desirous of establishing the legality of the principle derived from the Roman jurisprudence, have confounded the case of a seizure on the high sea, and that made in the ports of a nation, of goods of an innocent nature belonging to an enemy, with the seizure of *contraband of war*, and those two classes with the objects of *fiscal prohibition;* in short, the rights of each sovereign over his own subjects, with those which the law of nations, sometimes, gives him over the subjects of others.

(134) Digest, lib. 39, tit. iv. l. 11, *de Publicanis et Vectigalibus, et Commis. Dominus navis, si illicite aliquid in nave, vel ipse, vel vectores imposuerunt, navis quoque fisco vindicatur.*

(135) Mornac, ad leg. pen. ff. *de loc. et cond.* Bynkershoek, *Illust. Quest. tit. an licitum per illicitum publicatur,* cap. 12.

Two questions as to goods of enemies and friends.—Consolato del Mare.

3. This maxim of the ancient Roman law seems to have given rise to the two principal questions that form the subject of the present article; questions in the decision of which reasons and arguments to establish the universal theory and practice of the primitive law of nations have hitherto been employed in vain, since they form the precise point of collision between belligerents and neutrals. The first question is, whether the neutral flag covers the goods of an enemy, that is to say, whether a belligerent has a right to seize the effects of an enemy on board of a neutral ship; the second is, whether the belligerent has a right to seize and confiscate the goods of a neutral on board of an enemy's ship. We shall first examine, whether the conventional law of Europe, through its continual changes, will not furnish some rule of practice, that accords with the universal law of nations, more constant and more conformable to that of nature, and which alone, in my opinion, ought to be referred to in the decision of the question.

4. From the time when the famous *Consolato del Mare* began to be received as law among the nations situated on the shores of the Mediterranean, the maxim of the two hundred and seventy-third chapter of this Code was adopted. This chapter declares, that when goods belonging to a friend are found on board of an enemy's ship, and *vice versa*, regard should be had to the property only. This regulation produced two maxims which have been fol-

lowed or disregarded, in public treaties, according as the advantages of commerce, or the interests of the powers at war, induced their observance or rejection: 1st, The goods of an enemy laden on board of a friendly ship, are good prize, and therefore, confiscable. 2d, The goods of a friend on board of an enemy's vessel are free.

5. In the treaty made by Edward III, king of England, in 1351, with the maritime cities of Castile and Biscay, it was expressly agreed, that whenever English ships should capture, on the high sea, or in port, any enemy's ship, on board of which goods belonging to the subjects of Castile, or the province of Biscay, should be found, they should be restored to them, upon their oath; and that the latter should observe the same conduct towards the subjects of England.(136) The treaty of 1353, between England and the cities of Lisbon and Oporto, in like manner, declared, that the goods of a friend, found on board of an enemy's vessel were not subject to confiscation.(137)

6. Edward IV, king of England, and Francis, duke of Brittany, in their treaty of the 2d July, 1468, adopted a contrary maxim, following the example of the treaty of commerce of 1417, between Henry V,

(136) Rymer, *Fœdera*, tom. 3, part. 1, p. 71.

(137) Rymer, ibid. p. 88.

king of England, and John, duke of Burgundy. They stipulated, that, whenever the Bretons embarked their persons, goods, or effects on board of the vessels of an enemy of the king of England, there being no truce, and with a passport, it should be lawful for the English to seize and possess them; a right which the Bretons, on their part, should also enjoy.(138) The goods of enemies found on board of the vessel of a friend, are in like manner declared good prize, and confiscable, by the treaty of 1478, between the same Edward and Maximilien and Marie,(139) dukes of Burgundy, and in that of 1496, between Henry VII, king of England, and Philip, archduke of Austria, duke of Burgundy and Brabant.(140) The same regulation is to be seen also in the treaty of 1640, between Henry VI, king of England, and the republic of Genoa, in which mention is, besides,

(138) Rymer, *ibid.* tom. 5, part. 2, page 161. "Et parce qui est dit, et par ce present traité, n'est pas entendu que si les gens du paiis de Bretagne mettoient leurs personnez, biens ou marchandises, en naviers des partie d'ennemiez de nous et de notre paiis et royaume d'Engleterre, non aians sauf-conduit de nous, ne esteans in trues, ou abstinans de guerre avesquez nous, que les gens du dit partie d'Engleterre puissent prender, et acquirer à eulx les personnes et biens qu'ils prenderont dedans les naviers ennemiez de partie de nous et de notre dit paiis et royaume d'Engleterre, &c."

(139) Rymer, *ibid.* tom. 4, part. 3, p. 12.

(140) Rymer, *ibid.* tom. 5, part. 3, p. 88, et part. 4, p. 85.

Search of neutrals a consequence of the right to capture enemy goods.

made of freight due to neutrals for the goods of the enemy.(141)

7. The visit or search of merchant vessels, under the pretext of discovering, whether they have any goods on board belonging to subjects of enemy powers, is a consequence of the right assumed by belligerents of capturing enemy goods on board of neutral vessels. These visits occasioned many disorders, violences, and depredations, prejudicial to commercial nations, more especially, as belligerents sometimes behaved with so much rigour and indiscretion, as to declare good prize, and confiscable, not only the goods of the enemy, but the ship which carried them. This happened to the Dutch, in 1645, some of whose vessels, laden with goods for the enemy, were seized by the ships of war and armed vessels of the French, and immediately condemned as good prize, according to an ordinance of king Henry II, passed in the year 1538.(142) The states-general of

(141) *Nec caricabunt aut portabunt in navigiis eorum supra dicta bona aut mercimonia alicujus inimici nostri, aut inimicorum nostrorum, et casu quo fecerunt, petiti et interrogati per nostros dicti januenses debent immediate et sine dilatione (mediante juramento suo cui subditi nostri fidem debent) veritatem dicere, et quæ, et qualia bona inimicorum nostrorum, vel inimicis ducunt in navibus suis, et illa sine difficultate tradere et deliberare capitaneis vel ducentibus navigia nostra pro custodia maris, vel aliis subditis nostris, quos abusare contingeret navibus dictorum januensium, ubicunque super mare recipiendo* pro rata nauli, *sive affrectamenti hujusmodi mercium inimicorum, etc.*

(142) See Valin, *Comment. à l'ordonnance de la marine,* of August 1681 tit. *des Prises,* liv. iii. tit. ix.

Holland, complained loudly to the court of France, and after long debates on both sides, a treaty of commerce was at length concluded, on the 18th April, 1646, in which it was agreed, that the execution of that ordinance should be suspended for four years, so that Dutch merchant vessels might freely pass with their cargoes, though consisting of grain and timber, laden for account of the enemy: goods *contraband of war* were alone excepted. The same rule was also to be observed by the states-general, in regard to goods belonging to France.(143)

8. The Ottoman Porte, which, at all times, has given an example of moderation to the more civilised nations of Europe, was the first to abandon the ancient maxim sanctioned by the treaties that have been mentioned. In 1604, the Porte agreed with Henry IV, king of France, that the French flag should protect the goods and effects of enemies from

(143) The grand pensionary De Witt, managed this affair by his ambassador Boreel, who informs him, in one of his letters, of its being concluded. "I have obtained the repeal of the pretended French law, which confiscates the goods of a friend, found with those of an enemy; so that, in future, if goods belonging to the enemies of France, are found on board of a free Dutch vessel, those goods alone shall be confiscated, and the vessel and the rest of the cargo shall be released; for it is impossible to obtain what is contained in the 24th article of my instructions, where it is said, that a free ship should make a free cargo, even though belonging to an enemy." Dumont, *Corps diplom.* tom. 6, part. 1, page 342.

Ottoman Porte agrees, that free ships shall make the goods free.

seizure.(144) The same privilege was granted by the Sultan Achmet, in 1612, in the 25th article of the treaty with the United Provinces of Holland, and with still greater extension, since it exempted from confiscation the effects of friends found on board the ships of pirates.(145) On the same principle were founded the subsequent treaties of amity between the maritime powers of Europe, and the regencies of Algiers, Tunis, and Tripoli. The Dutch, the Danes, and the Swedes, acquired, in this manner, the right of lading their vessels with goods belonging to nations who had made no convention with the Barbary powers, and who, for that cause, were regarded as its enemies, since it was sufficient that the flag or vessel should be free to render the cargo also free.(146)

9. Since that period, so glorious for nations whom we call barbarous, the flag of a friendly nation was, in all the treaties of navigation and commerce, a sufficient security for the goods of enemies. This principle was adopted by France and Holland, in the 14th article of their treaty of 1646 ; by England and

(144) Art. 12. " Voulons et commandons que les marchandises qui seront chargées à nolis sur vaisseaux Francais, appartenant aux enemis de notre Porte, ne puissent être prises sur coleur qu'elles sont nos dits enemis, puisq' ainsi est notre vouloir." Rymer, *ibid.*

(145) Rymer, *ibid.* Aitzema, tom. 1, p. 331.

(146) Dumont, tom. 7, part. 1, page 205, part. 2, page 75.; et tom. 8, part. 2, page 136.

Various treaties declaring free ships make free goods.

Portugal, in the 23d article of their treaty of 1654. It is further to be found in the 2d and 3d articles of the treaty of 1655, between France and the Hanse-Towns; in the 15th article of the treaty concluded in the same year, between France and England; in the 19th article of the treaty of 1656, between England and Sweden; in the 19th article of the treaty of 1659, between France and Spain; in the 12th article of the treaty of 1661, between Portugal and the United Provinces of Holland; in the 25th article of the treaty of 1662, between Holland and France, confirmed by the subsequent treaties in the years 1678, 1697, 1713, and 1739. It is further sanctioned by the 27th article of the treaties of 1662, and 1742, between France and Denmark; by the 19th article of that of 1672, between France and Sweden; by the 8th and 27th articles of the treaties of 1677, and 1713, between France and England; by the treaty of 1667, between Spain and England, which was subsequently confirmed by the 23d and 26th articles of those of 1670 and 1713. This maxim continues to reign in the diplomatic Code of Europe. We see it further recognised and adopted by the 24th article of the treaty of 1661, between Portugal and Holland; by the 8th article of the treaty of 1667, and by the 8th and 22d articles of the treaties of 1675 and 1679, between Sweden and Holland; by the 10th and 8th articles of the treaties of 1668 and 1674, between Holland and England; by the 10th article of the treaty of 1725, between the emperor Charles VI, and Philip V, king of Spain; by the 9th

article of the treaty of 1742, between Spain and Denmark; by the treaty of 1748, between the court of Copenhagen, and the king of the two Sicilies; by that of 1756, between the king of Denmark, and the republic of Genoa; and, lastly, by the treaty of 1752, between the king of the two Sicilies and Holland.(147)

10. It is evident, from the view here given, that the universal practice of Europe, for more than a century, has been to consider only the property of the vessel. The principle of this almost general rule is, that a free ship makes free the goods on board. Thus the neutral flag ought to render free the goods belonging to enemies, excepting such as have been declared *contraband of war*; the vessel of an enemy with its cargo, though it belonged to neutrals, became a good prize, and confiscable.

11. Among the existing treaties in the diplomatic Code of Europe, there are two founded on the ancient rule that regards only the property of the cargo: the treaty of 1661, between England and Sweden,(148) and that of 1670, between Sweden and Denmark,(149) in which the goods of a neutral,

(147) *Mercur. hist. et polit.* 1753, Sept. p. 244. Hubner, *de la saisie des bâtimens neutres*, tom. 2, p. 188.

(148) Dumont, tom. 6, part. 2, art. 12, p. 384.

(149) Dumont, tom. 7, part. 1, art. 20, p. 132.

found on board of an enemy's ship, are declared free, and those of an enemy on board of a neutral ship, confiscable. The treaties of commerce concluded in 1734 and 1766, between Great-Britain and Russia, produce considerable doubt and obscurity on this point; for, if we judge by the letter of them, we shall be embarrassed to decide whether they meant to adopt the old or the new rule.(150) It seems as if they intended to leave the decision of every case to the caprice of interpretation, since they have not expressly designated what goods are subject to search, whether such as are contraband, or those belonging to an enemy, or both, when found on board.

12. France, in her treaty of 1716, with the Hanse-Towns of Hamburg, Lubeck, and Bremen, discards the ancient rule, above mentioned, and followed before in numerous treaties. To the great

(150) The 11th article of the treaty of 1734, is in the following words: "The subjects of both parties may freely go, come, and trade with all states which are, or may, hereafter, be at enmity with either of the contracting parties, excepting only places actually blockaded or besieged; provided they do not carry warlike stores to the enemy, they may transport all other effects; the vessels, passengers, and effects shall be free and unmolested." Another treaty, in 1766, essentially agrees with this article; but the 10th article goes further: "With regard to the searching of merchant-ships, men of war and privateers shall behave as favourably, as the reason of the war, then existing, can possibly permit towards the most friendly powers, who remain neuter; observing, as far as may be, the principles and maxims of the law of nations, that are generally acknowledged."

astonishment of all Europe, it was stipulated in the 22d and 24th articles, that the neutral flag should no longer cover the goods of an enemy. By this treaty, effects belonging to enemies, shipped on board of the vessels of the three cities, as well as the goods of the latter found on board of the vessels of an enemy, were subject to confiscation.(151) But in 1739, this same power, in the 23d article of another treaty with Holland, adopted a contrary rule. It is there stipulated, that the friendly flag should cover the effects of enemies, provided, they were not articles contraband of war, the usual restriction in all treaties founded on this principle.

13. In the present age, which boasts of being enlightened by the torch of philosophy, we have often seen a power extend its rights beyond the bounds of justice and moderation, while those of another have been restrained to excess, and even to a degree of oppression. Whenever the strongest wished to give law to the weakest, the latter has been forced to yield obedience, however injurious it might be to its interests, which it was obliged to sacrifice to the cupidity and caprice of one more powerful than itself. Thus it has happened, that in spite of the universality of those principles, consecrated by the public conventions that have been cited concerning the commerce of neutrals and the privilege of their flag, the abuse of power has led the very governments

(151) Dumont, tom. 8, part. 1, page 478.

who signed those treaties, to forget their principles at the commencement of every war. By their ordinances and marine regulations, they have authorised their ships of war and privateers, to seize the goods and effects of enemies, found on board of neutral ships, and have prescribed laws to neutrals in restraint of the freedom of their commerce, though often in direct opposition to the public faith of treaties. From these proceedings of particular nations, we can deduce no general maxims on this subject, but the following; "I wish all nations to do me justice; but I do not consider myself bound to do justice to them in return, because, I am stronger and richer than they."—Or what is more equivalent; "I will never suffer other nations to treat me in the same manner as I treat them."——In the language of Seneca,

Id esse regni maximum pignus putant,
Si quidquid aliis non licèt, solis licet.(152)

14. From the war of 1740, to that of 1778, nations put in practice the ancient and injurious principle of seizing, every where, and without regard even to the neutral flag, the goods and effects of enemies. This pretended right was supported by force of arms, in spite of the unceasing complaints of nations who took no part in the wars. The thirteen United States of America, were the first to propose the freedom of commerce. They obtained this freedom from France,

(152) Seneca in Agamemnon, V. 287.

Holland, and Sweden, as appears by their respective treaties of the 6th February, 1778 ;(153) of the 8th October, 1782,(154) and of the 3d April, 1783.(155)

(153) Art. 23. "It shall be lawful for all and every of the subjects of the most Christian king, and the citizens, people, and inhabitants of the said United States, to sail with their ships with all manner of liberty and security, without distinction as to who are the proprietors of the merchandise laden on board, from any port to the places of those who now are, or hereafter shall be at enmity with the most Christian king, or the United States. It shall, likewise, be lawful for the subjects and inhabitants aforesaid to sail with the ships and goods aforementioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforesaid, to neutral places, but from one place belonging to an enemy, to another place belonging to an enemy, whether they be under the jurisdiction of the same prince, or under several. And it is hereby stipulated, that free ships shall also give freedom to the goods, and that every thing shall be deemed free and exempt, which shall be found on board the ships belonging to the subjects of the contracting parties, though the whole or a part of the cargo belong to enemies of either, contraband goods being always excepted."

(154) Art. 11. "Declaring most expressly, that free vessels shall assure the liberty of the effects with which they shall be loaded, and that this freedom shall extend equally to the persons who who shall be found in a free vessel, who may not be taken out of her, unless they are military men actually in the service of an enemy."

(155) Art. 7. "And as it is acknowledged by this treaty, with respect to ships and merchandise, that free ships shall make free goods, and that every thing which shall be on board of ships belonging to subjects of either of the contracting parties, shall be

The same thing was ordained by the king of France, in the 1st article of the ordinance of the 26th July, 1778, concerning the navigation of neutral vessels in time of war. In consequence of this principle which happily began to revive in Europe, the empress of Russia, Catharine II, proposed her declaration of the 28th October, 1780, with the firm resolution to demand its execution as a right, and to maintain it with the united forces of all the nations who should accede to the project of an armed neutrality, the principal end of which was, to cause the goods of enemies, under a neutral flag, to be respected, when not contraband of war.(156)

15. In the treaty of amity, commerce, and navigation, between the United States of America and Great-Britain, made on the 19th November, 1794, and ratified the 29th August, 1795, the rule just now mentioned, has been adopted on a principle more conformable to the maxims of common sense and the law of nations. The 17th article declares, "that in all cases where vessels shall be captured or detain-

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deemed free, even though the whole or a part of the cargo should belong to the enemies of both; provided nevertheless, that contraband goods shall be always excepted.

(156) See *ante*, art. 3, § 17, the acts of accession to this declaration by the emperor, Holland, Denmark, Portugal, Sicily, Prussia, and France, as well as the protestations of England and Spain, who referred themselves, on this point, to their treaties and the general law of nations.

ed, on just suspicion of having on board enemy's property, or of carrying to the enemy any of the articles which are contraband of war, the said vessel shall be brought to the nearest or most convenient port; and if any enemy's property shall be found on board such vessel, that part only which belongs to the enemy, shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment." The last treaty of amity, limits and navigation, between the United States of America and the king of Spain, declares the same principles, in the 15th article, that in case of a war of either of the contracting parties, the commerce of the subjects of the belligerents respectively is to be unmolested, except in respect to contraband goods, and that free ships shall make free the goods on board, &c.*

16. At the period of the treaty of Westphalia, there resulted from all the existing treaties among the powers of Europe, a striking variation in the conventional law of nations concerning the navigation and commerce of neutral states in time of war. These treaties, in the analysis of them, present the following contradictions:

1st. The friendly flag covers the property of enemies.

* The words of this article are almost the same as those in the treaty with France, Holland, Sweden and Prussia....T.

Contradictions in the law of nations before 1778.

2d. The friendly flag does not cover the property of enemies.

3d. The property of a friend, found on board of an enemy's vessel, is good prize.

4th. The property of a friend, found on board of an enemy's vessel, is not good prize.

17. It was not until more than a century after this state of confusion, that is, during the war between England and her colonies in America, that the great majority of maritime powers, conducted by France and Russia, laid, in a solemn manner, the foundations of this part of maritime law in favour of neutrals. France, then at war with England, by an ordinance of 1778, positively prohibited "all armed ships from seizing and bringing into the ports of the kingdom, the vessels of neutral powers, though coming from, or destined to, the ports of an enemy, excepting always such as were carrying succours to places blockaded, besieged, or invested, and ships laden with contraband goods or warlike stores." The declaration of Russia, in the month of March, 1780, to the courts of London, Versailles and Madrid, sanction the same principle, in terms more precise; "She finds," says she, "these principles conformable to the primitive rights of nations which every people may reclaim, and which the belligerent powers cannot invalidate without violating the laws of neutrality, and without disavowing the maxims

they have adopted in their different treaties and public engagements :—these principles are,

" 1st. That all neutral ships may freely navigate from port to port, and along the coasts of nations at war. 2d. That the goods of subjects, belonging to the belligerent powers, are free in all neutral vessels, except contraband merchandise."

18. These principles formed the subject of the conventions between Russia, Denmark, and Sweden, in June and July, 1780, to which France, Spain, the United Provinces, Russia, the emperor, Portugal and Naples, adhered. Russia, afterwards, in the war of 1787, against the Turks, declared her intention religiously to observe, for the benefit of all nations, which should remain neutral, during the existing war with the Ottoman Porte, the beneficent system of the armed neutrality, that she had established. But, in the 13th article of her ordinance of the 31st December, 1787, she carried, still further, her respect for the flag of neutral nations, by stipulating, that, " when neutral vessels should be convoyed by a vessel of war of their own nation, the former should not in any manner be boarded, but application should be made directly to the commander of the convoy ; and if he declared that the ships under his convoy had not any goods contraband of war on board, the belligerent should be satisfied with this declaration, and not insist on making search."

It was this pretended right of searching neutral vessels under convoy, which, in the last war, gave rise to the hostile preparations of the northern powers against England. The latter perceiving that its naval force could hardly impose this law on the coalesced powers, solicited a convention with Russia, which was made the 17th June, 1801, the 3d article of which is in the following words: "That the ships of the neutral power shall navigate freely to the ports and upon the coasts of the nations at war. That the effects on board of neutral ships shall be free, with the exception of contraband of war, and of enemy's property; and it is agreed, not to comprise in the number of the latter, the merchandise of the produce, growth or manufacture of the countries at war, which shall have been acquired by the subjects of the neutral power, and transported for their account, which merchandise cannot be excepted in any case from the freedom granted to the flag of the said power."

ARTICLE II.

Of the primitive and universal Law of Nations, concerning the capture of the goods of enemies on board of neutral vessels.

§ 1. THE variety of rules adopted in the treaties that have been mentioned, clearly proves, that the conventional law of Europe does not furnish a fundamental, uniform, and invariable maxim, that can

remove all the subjects of complaint occasioned, in every war, by the collision of rights, equally natural and positive, between belligerents and neutrals. It is, therefore, necessary to examine, whether the supposed privilege of the neutral flag, to cover the goods and effects of enemies, is conformable to the principles of the primitive and universal law of nations, or, in truth, whether belligerents commit injustice by seizing the goods of enemies on board of neutral vessels, when the latter have not renounced the privilege of their flag by a special treaty, or by some tacit agreement.

2. The imperious law of necessity, to which every thing yields, stronger than human compacts, and founded on the irresistible propensity of men to provide for their self-preservation, even by means which in every other case would be criminal;(157) this law, which is a tacit exception to all other laws, when their execution would be destructive to society, or an evil so great as to exceed the powers of the human mind,(158) is that which commands the belli-

(157) *Puto igitur esse hanc necessitatem, cui nulla vi resisti potest, quæ neque mutari, neque leniri, potest . . . . . quod adjungitur . . . . . omni tempore id pertinebit . . . . . aut ad honestatem aut ad incolumitatem aut ad commoditatem.* Cicero, *de Inventione*, lib. 2, cap. 57. *Ex dictis patet hominem ad advertendum periculum vitæ non tantum instinctu naturæ ferri, sed et jus eidem ex dictamine rectæ rationis competere.* Thomasius, *Jurisprud. divin*, lib. ii. cap. ii, § 130.

(158) *De nostra vero necessitate communiter regula profertur, necessitas non habet legem, et hæc regula de omnibus legibus non est*

Necessity authorises belligerents to seize the property of their enemies.

gerent to deprive his enemy of every means of becoming stronger or more capable of attack, to weaken him by every possible mode, to prevent the augmentation of his forces, and the prolongation of war, and to compel him to sue for peace. It is this law, in short, which authorises the belligerent to invade and seize the property of his enemy in every place where the universal law of nations allows him to commit acts of hostility, that is, on his own territory, on the territory of the enemy, and in every other place not subject to the jurisdiction of another sovereign. The high sea, as has been repeatedly shewn, is a space subject to the power of no person: The belligerent may, therefore, seize the property of his enemy, on the high sea, whenever chance shall put it in his power, even when found on board of a neutral and friendly vessel:(159) provided, that in

intelligenda. Igitur quæstio est an necessitas in legibus exceptionem tacitam faciat, ut legislator non præsumatur talibus subjectum adigere voluisse, ut legem observet, si observatio cum periculo ejusmodi vitæ sit conjuncta. Thomasius, *ibid.* cap. 2, § 131.

(159) *Idem statuendum arbitramur si res hostiles in navibus amicorum reperiantur. Illas capi posse nemo dubitat, quia hosti in res hostiles omnia licet eatenus ut eas ubicumque repertas sibi possit vindicare.* Heineec. de navib. ob. vect. vet. merc. com. cap. 2, § 9. *Nec aliter decidenda res est si è contrario navis amicorum merces hostium ferat: merces enim capi possunt, salvâ navi.* Hen. Cocc. *de jur. bell. in amic.* § 34. "On the other hand, whenever I am at war with a nation, both my safety and welfare prompt me to deprive it, as far as possible, of every thing which may enable it to resist or hurt me. Here the law of necessity shews its force. If

the exercise of this right, he does not transgress the bounds of moderation.(160)

3. This principle, at first view, appears to bring into collision the right of belligerents to seize the goods of an enemy, wherever they may be found, with the right of neutrals not to be molested in their peaceful and lawful navigation. But sound justice and general reason will decide differently on this point.

4. It is a sacred and inviolable law of nature, which, in the conflict of two equal rights, suspends that whose interruption will produce the least damage, or a loss that may be the most easily repaired, or the least expence. Hence arises this general theory of the law of nations, which has never been controverted; *When the perfect right of one*

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this law warrants me, on occasion, to seize what belongs to another, shall it not likewise warrant me to stop every thing relative to war, which neutral nations are carrying to my enemy?..... It is, therefore, very proper and very suitable to the law of nations, which disapproves of multiplying the causes of war, not to consider those seizures of the goods of neutral nations as acts of hostility." *Vattel*, book iii. ch. iii. §iii.

(160) "Belligerents have a right to annoy their enemy in every way, which the legitimate purpose of war may require, and consequently, that of preventing such enemy from being strengthened, since succours of any sort may retard the establishment of peace; provided always, that the exercise of this right does not infringe the perfect and incontestible rights of friendly nations." Hubner, *de la saisie des bâtimens neutres*, part. 1, ch. 1, p. 186.

Necessity justifies the seizure or destruction of another's property.

nation clashes with the perfect right of another, reason, justice and humanity require, that in such case the one that will experience the least damage should yield to the other. For this reason the laws permit the throwing a part of the cargo of a vessel into the sea to save the residue; and the goods saved are bound to contribute to the loss thus occasioned by an imminent danger.(161) For the same reason we may pull down the house of a neighbour to prevent the fire from communicating to our own.(162) So when a ship moored in port takes fire, it is lawful for the ships that lie next to her, if they cannot otherwise escape, to sink and destroy her, and even the ship that is nearest to them, if it is necessary, in order to cut off the communication, and save the rest.(163) So

(161) Dig. lib. 14, tit. 2, *ad legem Rhodiam de jactu. Ut in levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*

(162) Digest, lib. 43, tit. 24, *Quod vi aut clam, Si pervenisset ignis eò usque absolvi eum opportere . . . . . Quoniam nullam injuriam dare videtur æque perituris ædibus.* To these principles may be added the regulation to be found in the 9th book of the Digest, tit. 2, l. 29, § 3, *ad legem aquiliam. Quod si vi ventorum navis impulsa esset in funes ancorarum alterius, et nautæ funes præcidissent, si nullo alio modo, nisi præcisis funibus explicare se potuit, nullam actionem dandam. Idem Labeo et Proculus circa retia piscatorum in quæ naves inciderat, æstimarunt. Planè si culpâ nautarum id factum esset lege Aquilia agendum.*

(163) Dig. lib. 14, tit. 2, *ad legem Rhodiam.* Dig. lib. 9, tit. 2, l. 29, § 2, & l. 49, § 1, *ad legem Aquiliam.* Dig. lib. 47, tit. 9, l. 3, § 7, *de incendio, ruina, naufragio, &c.* Vinnius ad Peckium, in leg. 1, ff. *de leg. Rhod.* Roccus, *de navibus et naulo.* not. 99, n. 256.

Necessity justifies the taking of the property of another.

where a river, swelled by torrents, is ready to overflow its banks, and to ruin, on the adjacent plains, the hopes of the husbandman, he is authorised, by the same principle, to use planks which do not belong to him, in order to strengthen, or raise the dike which protects his fields, and to save his harvest from inundation.(164) In short, it is on this principle that in an extreme scarcity, we may stop on the high sea ships laden with corn, and other provisions, for the immediate supply of the necessities of the nation.(165)

(164) Dig. lib. 39, tit. 3, l. 1, § 4 & 11, *de aqua pluv.*

(165) *Hinc primo sequitur in gravissimâ necessitate reviviscere jus illud pristinum rebus utendi tanquam si communes mansissent: quia in omnibus legibus humanis, ac proinde et in lege dominii summa illa necessitas videtur excepta. Hinc illud, ut in navigatione, si quando defecerit cibaria, quod quisque habet in commune conferri debeat. Sic et defendendi mei causa vicini ædificium orto incendio dissipare possum, et funes, aut retia discindere, in quæ navis mea impulsa est, si aliter explicari nequit. Quæ omnia lege civili non introducta, sed exposita sunt.* Grotius, *de Jure Belli ac Pacis*, lib. 2, cap. 2, § 6, n. 2 and 3.

Though the authority of Grotius is here adduced to support my opinion of the obligation to pay for things taken from ships, I do not therefore mean to adopt his absurd system of an imaginary return to a community of goods in a case of necessity. The obligation to make compensation to the value of the goods, being universally recognised as valid, can any one be adjudged to pay for what, according to Grotius, is his own? The truth is, that necessity is nothing more than an excuse, the effect of which cannot extend beyond the exigency of the case. A city in want of provisions, but rich in money, will be excusable in siezing and appropriating to itself, provisions though destined for others; but it ought to reimburse the owners to the value of them. The want of money

Compensation is to be made for the injury done in cases of necessity.

In all these cases, it is sufficient if compensation be made for the goods thrown into the sea, for the house pulled down, the vessel sunk, the planks made use of, the provisions taken; and the owners cannot then complain of the infringement of their right of property. It is true, that this sacred and unalterable right of society is, in these cases, attacked; but this violation is commanded by the imperious law of necessity, which, in this conflict, requires us to avoid an evil that is imminent, irreparable, and greater than death, or the ruin of a great number of individuals, on making a compensation to the owners equivalent to the loss sustained, or to the violence we have been forced to do to them.(166)

5. In that collision of rights which takes place between belligerents and neutrals, when the former stop the vessels of the latter, in order to seize the goods belonging to enemies found on board, the suspension of the exercise of the rights of neutrals appears to be easily compensated; since by making a just indemnity for the delay, and paying them the freight of the goods taken, the infringement which their natural liberty and independence sustains is but

might even serve as an excuse for not paying for them; but it would always remain under obligation to do so when it should be in its power. The same thing may be said of the other cases above mentioned. See Puffendorff, *de jure naturæ et gentium*, lib. 2, cap. 7, § 5, 6, et 6.

(166) Dig. lib. 9, tit. 2, l. 45, § 3, et l. 49, § 1, *ad legem Aquiliam.*

a slight sacrifice on their part, to the extreme necessity of self-defence; whereas we can neither calculate nor fix any indemnity to compensate the belligerents, for the evil done to them by the succours afforded by neutrals to their enemies, who are thereby enabled to prolong the war, and to multiply its calamities. By a suspension of their right to navigate freely and without hindrance the high sea, neutrals suffer only the delay occasioned by the search of vessels, and the loss of the consignments of the enemy;(167) since, as to the rest, belligerents respect, or at least ought to respect, according to the primitive and universal law of nations, all the other rights of property and independence of the neutral and friendly nations to whom the vessels belong, by leaving them at full liberty to pursue their course, after the seizure is finished, and the payment of the freight for the goods confiscated according to the bill of lading, and indemnifying them for the forced delay they have experienced.(168)

(167) "Neutral nations, it is true, suffer by a war in which they have no concern; but it is accidentally. I do not oppose their rights, I only make use of my own; and if our rights clash with, and reciprocally injure each other, it flows from the effect of an inevitable necessity. This collision happens every day, in war. When, in pursuance of my rights, I exhaust a country, from whence you drew your subsistence; when I besiege a city with which you carried on a large trade, I, doubtless, injure you, I cause losses and inconveniences; but it is without any design of hurting you. I only make use of my rights, and consequently do you no injustice." Vattel, book iii. ch. 7, § 112.

(168) Cocceius, *Dissert. de Commiss.* § 24. Grotius, *de Jure Belli ac Pacis*, lib. 3, cap. 1, § 5, n. 3. *In tertio illo genere usus*

Objection to the doctrine here advanced.

6. The fundamental principles which have been laid down, in the preceding pages, may, perhaps, be objected to what has been advanced in this place. It will be said, that the commerce of neutrals, in time of war, ought to be free, so far as it is not concerned in contraband. Belligerents are permitted to sieze the effects of their enemies wherever they find them, even on board of neutral vessels, by virtue of the law of necessity which gives the right of diminishing their forces, in order to constrain them to make peace. The goods of neutrals, the transportation of which is not prohibited, augment, also, the forces of the enemy, and enable him to do irreparable damage to the belligerent: if, therefore, it is permitted to sieze the former, it must be equally allowable to sieze the latter: if the necessity of self-de-

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ancipitis distinguendus erit belli status. Nam si tueri me non possum, nisi quæ mittantur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis nisi causa alia accedat.——Jus dabit injiciendi manum ne perveniat ad hostem meum, sed domino rem aut compensationem debebo. Gronovius, *Notes on Grotius.*

In support of my opinion I shall cite the following extract from the 273d chapter of the *Consolato del Mare*, whose authority ought to outweigh every other. "If an armed ship or cruiser of any kind, going out or returning, meet with a merchant vessel belonging to an enemy, and carrying a cargo belonging to an enemy, ...if such vessel be neutral, and the cargo the property of enemies, the captain of the cruiser may compel the master of the merchant vessel to carry the vessel with her cargo to a place of safety.....paying to the vessel the whole freight which she would have earned, if she had delivered the goods at the port of destination, according to the papers found on board."

fence permits the infringement of liberty and independence as to the one, it ought to give the same right over liberty and independence as to the other.(169)

7. The inconclusiveness of this objection will be readily acknowledged when it is observed, that the siezure of goods of an enemy on board of a neutral vessel, is injurious to the enemy alone, by depriving him of the succours he expected; and that the little damage suffered by neutrals is immediately compensated by the payment of freight and an indemnity for the delay; but, on the contrary, the interruption of that commerce which neutrals had been accustomed to carry on with the belligerent nations before the rupture, would be to them an irreparable injury. This theory is so true, that if we suppose a case in which the belligerent has it in his power to make reparation to neutrals for the damage caused to them by the loss of the goods which constitute the subject of their customary trade with the enemy, he might lawfully sieze them also, provided, he paid the value of them in money or in other goods agreeably to the

(169) This argument, if not entirely, is at least, in part, supported by the authority of Hubner, in his work *de la saisie des batimens neutres*, Vol. I. p. 210, ch. 2, § vi. "Now, this being the case, the commerce with belligerents being in general free to neutrals, and that which is done on commission makes a part, it follows, that free ships ought to make the goods on board free, except such as are prohibited in time of war; that is to say, the neutral flag ought fully to cover goods not contraband of war, in all neutral places."

Assertion of Hubner as to neutral ships, has no foundation.

terms on which they were to be sold at the place of their destination.(170)

8. Nor is there any more solidity in the gratuitous assertion of Hubner, made without the least proof, that a ship, on the high sea, ought to be considered as a part of the territory of the sovereign whose flag she bears; that she ought, consequently, to be inviolable, and that to seize goods found on board of her, is the same thing as to plunder them on neutral territory.(171)

9. I forbear to demonstrate the falsity of the prin-

(170) *Alia verò quæstio est, si res pacatorum ad hostes nostros destinatæ sunt, etsi non traditæ; nam illæ, si juvandi hostis causa submittuntur, hostiles sunt et diripi possunt. Si nudi commercii gratiâ, non quidem capi possunt; sed si nobis pretium offerentibus, domini earum vendere nolint, exuunt mediorum partes, ac hostiles sequi incipiunt.* Coccei, *Dissert. de Jure Belli in Amic. Disput. Cur.* tom. 2, *disp.* 2, § 32. Lampredi, *Juris public. univer. Theorema.* par. 3, cap. 13, § 7, n. 2.

(171) "Now neutral vessels are indisputably neutral places; hence it follows, that if they are incontrovertibly laden for the account of enemies, belligerents have no right to molest them on account of their cargoes, since to take goods from a neutral vessel amounts to the same thing, as to take them from neutral territory." Hubner, tom. 1, p. 211. "Or les vaisseaux neutres sont sans contredit, des lieux neutres; d'ou il s'ensuit que, quand ils seraient icontestablement chargés pour le compte des enemis, les belligerens n'ont aucun droit de les inquieter au sujet de leurs cargaisons, puisque il revient au même d'enlever des effets d'un navire neutre, ou de les enlever sur un territoire neutre."

ciple on which the doctrine of Hubner is founded; that the place occupied by the vessel is to be considered as a part of the territory of the sovereign whose flag she bears. The flag, with the passport and charter-party, prove only to what country she belongs. This point has been already sufficiently discussed, in the first volume of this work, chap. 2, art. 7, § 2. I shall confine myself to a single observation on the opinion of this writer; that if it was founded in reason, it would be equally unlawful to seize warlike stores and goods contraband of war, and provisions destined for places besieged or blockaded, when carried by a neutral vessel. Yet all the writers on public law, and Hubner himself, are of a different opinion. The immunity of the flag which this author supposes, without any plausible reason, to be the same as that of the territory, proves nothing, therefore, in favour of the liberty of neutral commerce, in the sense of the argument here stated.

10. Though I have adopted this maxim as most conformable to the true principles of the general law of nations, yet I do not pretend to infer from it that nations have not the power, in their treaties of navigation and commerce, to renounce their right to the effects of enemies on board of neutral vessels, since it is lawful for every power to dispose of its rights, and to suspend the exercise of them as it may think fit; on the contrary, I cannot too much applaud that spirit of moderation which, at the present day, has induced so many nations to renounce that

Articles which ought to be found in the conventional Code of nations.

right. That all the nations in the world may, in time of war, make the same sacrifice to the liberty of navigation and commerce, will ever be an object of my wishes. They will experience fewer losses and disasters, in proportion, as the collision between the rights of belligerents and neutrals more seldom occurs.

11. The period the most favourable and the fittest to procure this happiness for mankind, will, unquestionably, be that of the general pacification of Europe after the ruinous war which now desolates it. The surest means of attaining this object, would be by the treaties of peace, that will undoubtedly be made by the belligerent powers. What benefits would result to commercial nations, if in all future treaties, they were to adopt the following articles, as the foundation of a new conventional Code!

I. In future no merchant vessel shall be stopped nor seized, unless laden with articles really contraband.

II. The rights of the neutral flag shall be considered inviolable.

III. The sea-ports, even those of the belligerent nations, shall enjoy the privileges of neutrality, as to those articles of commerce which have no immediate relation to war.

Reasons that render probable the formation of a new Code of maritime law.

IV. The denomination of contraband shall extend to those articles only that are of immediate use in war.

12. This idea may, perhaps, be considered as one of those political dreams, formerly indulged, as to a perpetual and universal peace. No person, however, will deny the possibility of its being realised. It may be objected, that England has continued for two centuries to oppose other nations in their mitigated principles of maritime law; that confiding in the superiority of her naval power, she has constantly affected to give law to others on this point, and will not fail to defeat such a project. In answer, I shall adduce facts that have happened in the present age sufficient to obviate these objections, and to give weight to the possibility of this system.

13. The three powers who were the first to unite in the armed neutrality proposed by the empress of Russia, in 1780, certainly did not reckon on the accession of England, who, in her answer to the declaration presented by their ambassadors, did not appear in the least disposed to unite with them. The great Frederick, king of Prussia, acceded to the coalition, and gave it greater force than it could have derived from a naval power. The assent of France to the maxims contained in their manifesto, gave also a powerful support to the coalition.

14. Though Spain delayed making any public declaration, as did Portugal, which, at that time, was

Means of securing the adoption of the new Code.

the only nation privileged by England, (a favourite expression used in her public acts) in regard to the rights of the neutral flag, yet the latter began to relax so much on this point, that if the war had continued for a longer period, there would certainly have been no more question about the seizure of neutral vessels, or the capture of merchant ships. In fact, Spain renounced the practice in 1782, in her act of navigation, and permitted neutral vessels to go from port to port in the Antilles in the same manner as was allowed by France and Holland in their respective possessions. Such, at that time, was the effect of a good example, and of the union of three sovereigns, though they held only a second rank among maritime powers. To reproduce an effect so salutary to the commerce of Europe, it is necessary only that the same cause should again exist, that is, a union of several respectable powers, founded on the same maxims. In whatever way this coalition may be formed, the more preponderating those powers shall be who first enter into it, the more will their example influence others who are equally interested to follow it, and who will eagerly concur in all proper measures to secure a result so favourable as the enfranchisement of their commerce, and the solemn establishment of their rights.

15. France has already made a treaty of peace with Prussia, in which the interests of commerce are not forgotten. In her treaty of peace with

Present state of Europe, is favourable to a new system.

Spain, it has been stipulated to give to the merchants of the two nations, established in their respective ports, the former privileges lost during the war, reserving, besides, to a future time, the formation of a treaty of commerce. The treaty of peace with Sardinia contains the same stipulation.

16. The enmity of mortals cannot be eternal, especially when it causes torrents of blood to flow, and reduces nations to despair. The perfect pacification between France, the house of Austria, and all Germany, is, at length, consolidated. The former knows by experience how prejudicial is the interruption of its commerce with the northern nations of Europe. All are convinced, that this interruption proceeds from a want of a permanent and invariable maritime Code in Europe, founded on reciprocal and unalterable conventions, the establishment of which would deprive a belligerent of every pretext to disturb commerce in time of war. If the accesion of the late king of Prussia to the armed neutrality, produced the effect expected from it, what consequences may not flow from a convention between France, the house of Austria, and Germany, concerning the interests of their mutual commerce by sea and land. The four articles relative to maritime commerce would certainly be received with applause by all the world.

17. It is well known what were the principles that induced Sweden and Denmark to join the

armed neutrality of Russia; and there is no doubt that they would soon accede to the proposed convention. Prussia would not be among the last to join it, since the actual possession of Dantzic puts her in a situation to arm a marine more powerful than that which can go out of the ports of Swinemünde, Kolberg, Pillau, and Memel.

18. It is not probable that Russia will long persist in those principles of hostility which she seems to threaten. The advantages she expected from her exportations during war, were the true motives of her armed neutrality in 1780. Long experience has taught those sovereigns, whose dominions border on the Baltic sea, how much the maritime wars kindled in the south of Europe, enriched their commerce, since their productions are then in the greatest demand among the belligerents; but the difficulties which the vessels of different nations experience in the exportation of goods from the Baltic, shackle enterprise, and diminish the profits of commercial speculations. Russia will be the most interested in the freedom of neutral commerce, since her native productions are the most abundant; and her own vessels are not sufficient for their exportation. This is another motive to render her desirous that neutrals, who supply themselves there, should be protected in their navigation during a maritime war. She will not fail, therefore, to seize with eagerness every occasion to revive, and give solidity and force to the rights of neutrals, and to sanction

The southern states of Europe will accede to the system of free commerce.

the proposition for making them respected. If ever she find this great work commenced by other nations, far from contradicting the policy she has already exhibited, in 1780, she will assuredly give it new strength by her accession. Portugal and Naples will readily subscribe to the four articles above stated. The States of Italy, who have preserved or resumed their neutrality in the present war, as Sardinia, Genoa, Tuscany, the Italian republic, the court of Rome, the new republic of the Seven-Islands, will give their assent to this system without hesitation.(172)* The horrid spectacle of annihilated commerce and oppressed humanity; a desire to see

(172) "Let a sacred maritime and continental confederacy between Denmark, Sweden, Prussia, Holland, Spain, and Turkey, boldly stipulate, by the powerful organ of the French republic, that the seas are free; let Europe be in peace; let the safety of each nation, and the integrity of its territories and its colonies be secured by an *European pact:* that the flames of war may not again be kindled in Europe, unless by the crimes and ambition of England, let the continental nations turn the united forces of the *European league* against the aggressors of any nation in Europe, and against the disturbers of its repose, and of its maritime and political rights. Oh! how powerful would be the influence of such a proclamation made by the congress of nations, for the first time, on earth; and how beneficent would be its empire! It would cause to be forgotten the crimes and calamities which a century of English policy has spread over the earth." Barrere, *de la Liberté des Mers*, liv. 4, ch. 3.

* This day-dream of an ardent fancy bids fair to be, in some degree, realised, at least for a season. The continental powers, except Russia, Sweden, and Denmark, are either subjected to the power, or obsequious to the wishes of the present ruler of France,

activity restored to the one and happiness to the other, to connect all nations together by a happy union of their interests, and to give perpetuity to the prosperity of states, such are the motives which guide my pen and direct my plan. May I live to see it executed! At such a price death would be sweet indeed.

ARTICLE III.

Of the right of Belligerents to the goods of neutrals found on board an enemy's vessel.

§ 1. IT has been sufficiently shewn, in various parts of this work, that it is an incontestible principle of the primitive and universal law of nations, that neutral powers may freely trade with each of the belligerent parties, in the same manner as before the war, provided they take no direct or immediate part in the contest. There would be too much injustice in a contrary maxim, since it would tend to render

and will readily acquiesce in any schemes his interest or ambition may dictate. They speak, to use the modest expression of Barrere, "through the powerful organ of the French." If past experience could justify a confidence in the sincerity of the parties, or a belief in the permanence of such a system for the security of a free commerce, it might deserve the attentive consideration of all neutral and commercial states. Looking at the history of modern Europe, and at passing events, it is difficult to forbear smiling at the patriotic fervour and imposing language of Barrere....T.

Neutrals have a right to send goods in belligerent vessels.

the condition of neutral and pacific powers worse than that of the belligerents. All that the latter can demand of the former, in virtue of the rights derived from war, is, that they do not, in any manner, interfere in their quarrels; but to endeavour, under this pretext, to compel them to relinquish the power of providing for their own preservation and prosperity, by the most advantageous means, would force them to abandon their neutrality, in defence of their rights.

2. From these fundamental principles it must be inferred, that a neutral nation cannot, in any manner, be prevented from employing the vessels of either of the belligerents, for the purpose of continuing the commerce which it carried on before the war; nor ought they to be deprived of their goods by the capture of the vessel in which they are laden, provided, they prove their property, and make good their claim.(173) So that goods or effects, not be-

(173) *Paulo aliter rationes componendæ nobis videntur, si merces amicorum hostium navibus impositæ reperiantur. Hic enim vix ullam excogitari posse rationem existimamus quæ merces illas una cum ipsa navi capientibus acquiri persuadeat. Nec ob conditionem dominorum id fieri potest, qui hostium loco non habentur, nec ob delictum aliquod: cur enim nefas sit merces aliquas navi gentis alteri inimicæ imponere? Nec ob ipsam mercium conditionem, quippe quas licitas esse, nullaque lege vel denunciatione prohibitas ponimus. Unde meritò paulò inhumanior judicatur illarum gentium consuetudo, qua navi hostile captâ res hostium et amicorum juxta in prædam cædere capientibus judicatur.* Heineccius, § 3, *de navi. ob. vect. vet. merc. com.* cap. § 9. *Quare quod dici solet hostiles censeri res in hostium navibus, non ita accipi debet quasi certa sit juris gentium lex, sed ut*

Goods of a neutral on board an enemy's ship, are free.

longing to enemies, though found among them, cannot be seized under pretence of war. Consequently, the ship of an enemy, laden with articles which are not destined for warlike use and belonging to persons perfectly neutral, will be good prize, but not the cargo, unless the owners, by taking a part in the war, have departed from that perfect neutrality which they are bound to observe.(174)

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præsumptionem quamdam indicet, quæ tamen validis in contrarium probationibus possit elidi. Atque ita in Hollandia nostra jam olim anno scilicet 1333 *flagrante cum Hanseaticis bello, est judicatum et ex judicato in legem transiisse comperi.* Grotius, *de Jure Belli ac Pacis*, lib. 3, cap. 6, § 6.

"For there can be no doubt, if the neutral owner can produce satisfactory proof on all these points, that the cargo, though on board of an enemy's vessel, ought to be restored to him, or, if he prefer it, the value of the goods paid him. Agreeably to this equitable maxim, the Dutch, in 1438, in full assembly decreed, that, during the war then existing with the Hanse-Towns, the goods of neutrals should not be good prize, provided they put in their claim, and proved their property." Hubner, *de la saisie des batimens neutres*, tom. 1, ch. 9, § 1. "Effects of neutrals found in an enemy's ship, are to be restored to the owners, against whom there is no right of confiscation, &c." Vattel, *Droit des Gens*, liv. 3, ch. 7, § 116.

(174) *Quæ vero res hostium non sunt, et si apud hostes reperiantur capientium non fiunt: id enim ut jam ante diximus, nec naturali juri congruit, nec jure gentium introductum est.* Grotius, *de Jure Belli ac Pac.* lib. 3, cap. 5, § 26. Burlemaqui, *Principes du Droit Politique*, tom. 3, part. 4, ch. 4, § 1. Voet, *in Pandect.* lib. 49, tit. 15, § 5. Loccenius, *de jure marit.* lib. 2, cap. 4, § ult.

Neutral goods or vessels found in captured places, cannot be siezed.

3. According to the principles before advanced, to make a capture lawful, it is necessary that the goods or effects of enemies, should be found either within the territory of the belligerent, or within the territory of the enemy occupied by the belligerent, or in a space not subject to the jurisdiction of any one, as the high sea. Belligerents have no right over the effects of friends and neutrals, in whatever place they may be found, though within the territory, or in the vessels of enemies. For this reason, when a maritime city is taken by assault, or in any other way, the belligerent cannot seize the neutral vessels found in the port, nor their cargoes, unless they are contraband of war, and unless the captains have taken up arms, or voluntarily seconded the enemy in their resistance.(175) For a stronger reason ought the

(175) *Liquet et hoc, ut res aliqua nostra belli jure fiat, requiri ut hostium fuerit: nam quæ res apud hostem quidem sunt, puta in oppidis eorum, aut intra præsidia, sed quorum domini nec hostium sint subditi, nec hostilis animi, ac bello acquiri non possunt ut inter cætera Æschinis dicto jam loco ostenditur Amphipolim, quæ urbs esset Atheniensium Philippi bello Amphipolitanos ipsius Philippi non potuisse fieri; nam et ratio deficit et jus hoc mutandi per vim dominii odiosius est quam ut produci debeat.* Grotius, *ibid.* § 5. "It is asked, if in a city entered by surprise, without capitulation, or which has surrendered at discretion, the neutral vessels found in the port, become, with the rest, a prey to the conqueror? I answer, that the seizure of them will always be unlawful, if the crews of the vessels, whether they belong to neutrals or enemies, have not cooperated in the resistance, and assisted in the war." Galliani, *dei doveri principi neutrali verso i principi guerregianti, etc.* cap. 8, p. 272, & 273. It is this fundamental principle of universal reason

Goods of neutrals on board of enemy ships, are not good prize.

goods of neutrals, found on board the ship of an enemy, to be considered as free, since it cannot, as has been proved in the preceding articles, be regarded as the territory of the enemy.(176)

4. By this rule, so agreeable to natural equity, and to the principles of the primitive and universal law of nations, ought nations to be governed, when, by particular treaties, they have contracted no obligations to the contrary. This rule is as ancient as reason itself; it is expressly adopted in the 173d chapter of the *Consolato del Mare*.(177) It is further sanc-

that dictated the 18th article of the treaty of amity, commerce, and navigation, concluded the 29th August, 1795, between the United States of America and Great-Britain. "Nor shall any vessel or goods of either party, that may have entered into such port or place, before the same was besieged, blockaded, or invested by the other, and be found therein after the reduction or surrender of such place, be liable to confiscation, but shall be restored to the owners or proprietors thereof." The same stipulation is to be found in the 15th article of the treaty of amity, limits, and navigation, between the United States of America and Spain, the 27th October, 1796.

(176) *Ducit nos materiarum ordo ad res pacatorum quæ in hostium navibus reperiantur, sed si appareat eas esse amicorum, non hostium, cessabit jus belli cum nec hostium sint, nec in hostium potestate.* Hen. Cocc. *Disput. Cur.* t. 2, *disp.* 2, § 32. *Si vero probentur merces non esse hostiles, capientium vel piratorum non fiunt, sed restitui debent veris dominis, et si apud hostes, vel in navibus hostilibus inventæ, præsertim, si domini rerum non sint subditi hostium, nec hostilis animi.* Casaregis, *de Commer.* disc. 24, n. 18.

(177) "This must be understood, however, of a case where the

That neutral goods are free in enemy vessels, is recognised by treaties.

tioned by the treaty of commerce, made the 20th October, 1353, between Edward III, king of England, and the maritime cities of Portugal.(178) England again followed the same rule, in her treaties of 1661, with Sweden,(179) and of 1670, with Denmark.(180) She declared that, in matters of prize, regard should be had to the property alone, and thus goods belonging to neutrals, though found on board the vessel of an enemy, were free, and that the goods of enemies, though on board a neutral vessel, should not be exempted from seizure.

5. The same principle of natural equity, and the same primitive law of nations which, at that time, served as a rule of action for some of the maritime powers of Europe, taught them also, that goods la-

whole cargo, or a greater part, belongs to enemies. If the ship belong to an enemy, and the cargo be in whole or in part neutral property, the merchants on board of the ship to whom the cargo, in whole or in part, belongs, ought to enter into some agreement with the captors as to a reasonable price, on account of the ship which is become good prize, as they and the merchants ought to do every thing in concert."

(178) Art. 10. "And thus, if the people of the said king of England and France shall take on the sea any ships of their adversaries or enemies, and in the said ships shall be found goods, they shall be brought to England, and be safely kept until the merchants to whom the said goods or effects may belong, shall prove them to be their property."

(179) Dumont, tom. 6, part. 2, art. 12, page 384.

(180) Dumont, tom. 7, part. 1, art. 20, page 132.

den before a rupture, or before war was formally and publicly declared, could not be regarded as an infraction of neutrality, and that neutrals in such a case, had good right to claim exemption from capture. This circumstance was wisely guarded against in the treaty of 1677, between France and England; and the better to provide for the future cases which might arise, they fixed a period, before which time, if the goods of English or French subjects should be found in vessels of an enemy, they should not be subject to confiscation, but be restored to the owners.(181) The same stipulation is also found in another treaty, concluded in 1678, between France and the United Provinces.(182) Such regulations are agreeable to justice; on the the contrary, to declare the goods of neutrals, laden before a declaration of war, or before they could have known of it, liable to confiscation, would be very unjust;(183) it would be punish-

(181) Dumont, tom. 7, part. 1, art. 8. "This delay is six weeks between the Soundings (the shallows near Plymouth) and Naz (the promontory of Lindenaes, usually called on the charts Ter-Neuse) in Norway; two months between the Soundings and Tangier; two months and an half in the Mediterranean sea; and eight months in every other part of the world."

(182) Art. 22. "In the Baltic, or in the North sea, from Ter-Neuse in Norway to the extremity of the English channel, four weeks; from the extremity of the Channel to Cape St. Vincent, six weeks, and beyond that into the Mediterranean, and to the equator, ten weeks; and beyond the equator, and in every other part of the world, eight months."

(183) Galliani, after treating of this subject with much confu-

In the last century, the principle of free goods was abandoned.

ing men who were ignorant that they were offending.

6. This excellent and salutary principle, which prevailed for a long time in the public treaties of Europe, began to be abandoned towards the middle of the last century. The contrary principle, that the confiscation of the vessel involved that of the cargo, though belonging to neutrals, succeeded and was uniformly practised upon by the European nations for more than a century.(184) There is no reason which can authorise this practice, unless we are disposed to say with Lampredi,(185) "That nations have mutually agreed to tolerate it in order to prevent enemies from using the name of neutrals who may be secretly their friends, for the purpose of

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sion, and wasting his time to no purpose in philosophical distinctions, gives us, at last, this conclusion, page 27, ch. 8: "And yet it is sufficient for me to say, in this place, that a neutral unexpectedly surprised by the breaking out of war, at a time when he is with his goods in the territory of one of the nations just entering into war, ought not to be regarded as belonging to the country where he is found, but should be allowed the necessary time to withdraw from it with his effects."

(184) See the treaties between Spain and Holland, of the 17th December, 1650, art. 15; between England and Portugal, of the 10th July, 1654, art. 13; the treaty of the Pyrenees, of the 17th November, 1659, art. 18; that of the 6th August, 1661, between Portugal and the United Provinces, art. 23; that of the 21st December, 1661, between England and Sweden, art. 35.

(185) Lampredi, *del commercio de popoli neutrali in tempo di guerra*, p. 174.

screening their goods from seizure: this may be easily effected, if it be admitted, that the goods laden for the account of neutrals and effects belonging to them cannot be seized when found in the vessels of enemies." But though it may be true, as has been said elsewhere, that nations may, by their mutual conventions, derogate from the primitive and universal law of nations, it is no less true, that when they have not deviated from that law by a special treaty, they ought strictly to adhere to the ancient maxim, that restores neutral goods found in the vessel of an enemy captured by one of the belligerents, provided the owner furnish legal proof of his property. Such, at the present day, is the practice of some European powers.(186)

ARTICLE IV.

Of the Search of Neutral Vessels on the High Sea.

§ 1. THE primitive and universal law of nations, as well as the conventional law of Europe, in authorising belligerents to prevent neutrals from carrying goods *contraband of war* to an enemy, to capture the vessels of enemies, and even to seize those under a neutral flag, must also have given the power of using all

(186) See the 15th article of the treaty between the United States of America and Spain, of the 27th October, 1795, before cited.

the means best adapted to facilitate the exercise of these rights.

2. No means are more efficacious for this purpose than to stop and search vessels on the high sea. This proceeding is commenced by giving a signal to approach with a speaking-trumpet, or by firing a cannon loaded with powder only; a boat is then sent to reconnoitre, and to examine the papers with which the vessel is furnished for the voyage: these documents ought to show, in the most convincing manner, to what nation the vessel belongs, the nature of the goods which compose the cargo, and who are the owners; that is to say, it should be proved that the vessel really belongs to the nation whose flag it bears, that the crew and the goods actually belong to a neutral and friendly power, and, in regard to the cargo, that there is no fraud against the generally received usages of nations, or against any express declaration of neutrality. Neutrals, on their part, ought to permit this lawful and customary proceeding, and furnish to belligerents all the proofs which they have a well founded right to require by force.(187)

3. If the necessity of a just defence render it lawful for belligerents to destroy one another, they may,

(187) Vattel, *Droit des Gens*, liv. 3, ch. 7, § 44. Lampredi has treated this subject in an elegant manner, in his memorial published as to the validity of the capture of the Tuscan frigate *Thetis*, belonging to M. M. Ant. Francois Salucci and Son, of Leghorn, discussed in the council of state and war of his catholic majesty.

Custom of carrying a false flag.

for a stronger reason, be allowed to deceive each other, provided that deception and fraud, justly abhorred by civilised nations in time of peace, but called *stratagem* in time of war, have no other object than a necessary self defence, and to spare the effusion of human blood.(188) From this principle is derived the ancient custom that has become prevalent among nations, of navigating under some flag the best adapted to conceal the nationality of a vessel, whether a ship of war or merchant-man, with a view either to deceive or surprise the vessels of enemies, and to hail them for the purpose of capturing them with more facility.(189) This practice, which is really an

(188) Saint John Chrysostom with reason applauds the stratagem whose object is to conquer without destroying. *De Sacerdot.* lib. 1, cap. 4. *Si nobilissimos ducum ad examen voces, pleraque eorum tropæa reperies fraudum esse opera, magisque tales laudari, quam qui apertè agendo vincunt.* Wolfius is of the same opinion. *Etenim si in bello sine vi ea obtineri possunt, ad quæ bellanti jus est, ad ea obtinenda à vi abstinendum. Quod si ergo dolo hoc est simulatione vel dissimulatione obtineri quædam possunt, ad quæ alias vi opus esset, dolo potius quam vi utendum; atque adeo dolus in bello licitus.* Wolf. *Jus nat. et gent.* cap. 7, § 857. Grotius, *de Jure Bell. ac Pac.* lib. 3, cap. 1, § 5, 6, & 7. Hutcheson's *System of Moral Philosophy*, book 2, chap. 18, p. 126, &c.

(189) For this reason, armed cruisers have, from that time, been permitted to keep on board such flags as they thought proper, and to use them as occasion may require, either for reconnoitering more easily the vessels they may meet with, or to avoid the pursuit of such as are apprehended to be of superior force. They are only forbidden to fire the signal gun under a strange flag, &c. Valin, *Comment. à l'Ord. de la Marine de France*, tit. *des Prises*, art. 5. D'Habreu, *Tratado sobre las Presas*, part. 2, ch. 8, p. 86, &c.

A signal gun must be fired before attempting to search.

abuse, excites distrust. The fear of meeting with a pirate, and being the dupe of deceitful appearances, is the reason why no credit is given to the flag of a vessel, though a ship of war.

4. To guard against this danger, belligerents are obliged to prove the legality of their right of search, before they are allowed to exercise it, as the flag alone is not a sufficient title. Thus to recover property fairly possessed by another, it is not enough simply to demand it, unless the claimant accompanies his demand with the proofs of the goodness of his title, and the justice of his claim.(190) For this reason it has been generally agreed, that the hailing by a ship of war, was not to be obeyed, before she fired the signal gun, that is, before the commander had, by firing a cannon loaded with powder, made known the truth of his flag;(191) but as this signal

(190) *Dominus rem suam vindicaturus probare debet dominium rei quam sibi restituendam petit. De possessore adeo rei suæ conqueri nequit dominus, si sibi non restituatur, quamdiu dominium non probavit. Neque etiam eidem injuriam facit, qui non restituit, quando dominium probare nequit; dominus enim, cui restitutio fieri debet, non agnoscitur nisi probato dominio. Antequam dominus probavit dominium, vi adigere nequit eum qui rem in sua potestate habet, ut restituatur.* Wolfius, *Jus nat. et gent.* part. 2, cap. 3, § 546.

(191) "The signal gun cannot be fired, except under the king's flag, under the penalties mentioned in the regulations..... Yet, in imitation of the English, a contrary practice was introduced during the two last wars, and, in consequence, it is pretended, at the present day, that it is a lawful means of surprising a ves-

Mode of search first prescribed in the treaty of the Pyrenees.

might still be a feint the better to disguise the hostile views of some corsair or pirate, it has been further stipulated, that the ship, after having fired the signal gun, shall not bear down upon the neutral vessel, but must lie to, at the distance of cannon or half cannon shot, and put out a boat with an officer entrusted to go on board the neutral, in order to make the search.

5. The first public act that speaks of the manner of proceeding to make the search so as to avoid violence or disorder, is the famous treaty of the Pyrenees, of the 17th November, 1659. Its wise regulations have become the law of most of the maritime powers of Europe,(192) and have served as a rule and model for all subsequent treaties.(193) The pacific

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sel at sea, provided they do not fight under any other flag than that of their own nation. If a practice, and especially one that concerns honour and probity, can prevail over the law, I have nothing to say; but it appears to me to be no more than a trick of cowardice and perfidy, which the example of enemies cannot justify." Valin, *Comment. à l'Ordon. de la Marine de France*, art. 12, tit. *des Prises*.

(192) Ordinance of France, 1778; Ordinance of Spain, 1779, art. 6; Ordinance of Denmark, 1710, art. 6; Ordinance of Holland, 1781, art. 6; Ordinance of Sweden, 1715, art. 2, and 1741, art. 2; Ordinance of Russia, 1787, art. 4.

(193) Art. 17. "To avoid all disorder, the ships of Spain shall not approach those of France nearer than within cannon-shot, and shall send their boat on board of the French ships, with two or three men only, to whom the master of the French vessel shall exhibit the passports by which shall be made to appear, not only the lading, but also the place of domicil or residence; the name of

Object of the formalities required as to making search.

demeanour it prescribes to belligerents by removing all ground of suspicion to neutral ships, as to the character and nationality of the cruiser, evinces, that the summons given is in consequence only of a collision of rights, and of necessity, since it has no other object in view than to ascertain the neutrality announced by the flag, and the innocence of the

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the master or commander, and that of the ship, in order, by these means, to ascertain, whether she carries any contraband goods, and that the character of the ship, as well as the quality of the master or captain, may satisfactorily appear.' The same regulation is to be found in the 21st article of the treaty of the 31st December, 1786, ratified the 11th January, 1787, between France and Russia, and in that of the 17th January, 1787, article 20, between Russia and Naples; in the 21st article of the treaty of 1739, between France and Holland; in the 10th article of the treaty of 1740, between Sicily and the Porte; in the 22d article of the treaty of 1742, between France and Denmark; in the 24th article of the treaty of 1742, between Sweden and Sicily; in the 23d article of the treaty of 1748, between Denmark and Sicily; in the 26th article of the treaty of 1753, between Holland and Sicily; in the 10th article of that of 1766, between Russia and England; in the 33d article of that of 1769, between France and Hamburg, confirmed in 1789; in the 27th article of that of 1778, between France and the United States of America; in the 31st article of that of 1779, between France and the duke of Mecklenburg; in the 11th article of that of 1782, between Spain and the Porte; in the 10th and 26th articles of that of 1782, between Holland and the United States of America; in the 18th article of that of 1782, between Russia and Denmark; in the 25th article of that of 1783, between Sweden and the United States of America; in the 15th article of that of 1785, between Prussia and the United States of America; in the 13th and 15th articles of that of 1785, between Russia and Austria; in the 6th article of that of 1786, between England and France; in the 31st article of that of 1787, between France and Russia;

Neutrals are bound to submit to a search.

cargo, or that no contraband goods, or goods belonging to enemies, are on board. So that neutrals are bound to obey the summons and submit to the search which belligerents have a perfect right to make, founded upon the natural principle of self defence and the rights of war;(194) if they resist or oppose the search, they render their vessel liable to con-

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in the 20th article of that of 1787, between Russia and Sicily; in the 25th article of that of 1787, between Russia and Portugal; in the 11th article of that of 1789, between Denmark and Genoa; in the 4th article of that of 1736, between Sweden and Tunis; in the 4th article of that of 1729, between Sweden and Algiers; in the 4th article of that of 1741, between Sweden and Tripoli; in the 4th article of that of 1751, between Great-Britain and Tripoli; in the 4th article of that 1761, between Great-Britain and Morocco; in the 5th article of that of 1752, between Holland and Morocco; in the 4th article of that of 1784, between Spain and Tripoli; in the 2d article of that of 1786, between Spain and Algiers; in the 5th article of that of 1787, between the United States of America and Morocco; in the 12th and 17th articles of that of 1795, between Spain and the United States of America.

(194) "Now, as the navigator cannot feel at ease, if he have doubts as to the character of the vessels that are seen hovering around him, who will deny that he has a natural right to demand that they should make themselves known? The visit or search, therefore, is neither an act of superiority nor of jurisdiction. It is only a precaution rendered necessary by the natural right of self-defence; a precaution not confined to ships of war, nor allowed merely in time of war, but to all vessels, at all times, and in all places." Galliani, *ibid.* p. 458 & 460.

fiscation, and to be declared good prize, agreeably to the maritime laws of most nations.(195)

6. Galliani, in discussing this subject, in a philosophical manner, as is his practice, after analysing the different degrees of fear which may determine the master of a neutral ship, to avoid by flight the search of a belligerent vessel, thinks it unjust in this case, to confiscate the ship, though it may be agreeable to the universal practice established by the conventional law of Europe.(196) "A natural consequence," he observes, "of what has been said in regard to the "right of simple search, is, that if the vessel con- "cerning which suspicions are entertained, takes "flight, instead of obeying the summons, she ought "not for that reason to be pursued or punished for "her disobedience. Though she has not satisfied cu- "riosity by giving the evident proofs of her charac- "ter, she has, at least, removed suspicion, since "flight announces no hostile design: this is suffici- "ent for the mutual security of two vessels navigating "the seas on their own business. Besides, there is

(195) "Every vessel that shall refuse to lower her sails, after the summons made to her for this purpose by our ships, or those of our subjects armed for war, may be compelled to obedience by force of arms or otherwise; and in case of resistance and fight, shall be lawful prize." *Ordon. de la Marine de France*, tit. *des Prises*, art. 12. The Spanish ordinance of 1718, contains the same regulation. D'Habreu, *sobre las Presas*, par. 1, cap. 7, p. 89, &c. Cleirac, *de la jurisdiction de la marine*, art. 23, p. 441.

(196) Galliani, *ibid.* p. 460 & 491.

Opinion of Galliani, and remarks upon it.

"no doubt, that fear and suspicion are common to both "vessels, and are felt more strongly by the weakest; "now, the latter must dread throwing herself blind- "ly into the hands of an enemy or pirate, by obey- "ing the summons: her flight, therefore, is not a "real offence. For these reasons, the edicts of some "sovereigns must be considered as cruel and un- "just, which declare, without any form of process, "every vessel good prize, even as if an enemy, "that does not obey the summons, or makes resist- "ance, or fights. If the master prove, that he had "just cause to believe, that the summons was given "the better to conceal a surprise, he ought to be en- "tirely excused for disobedience, but if he cannot "justify his suspicions, he ought to be punished. "But we should never confiscate a vessel or goods "belonging to any other person than the obstinate "and ill-advised captain. That would, in fact, be im- "puting his acts to the owners."

7. In the preceding page, Galliani, had already described the mode of proceeding in making search of a neutral vessel, in order to remove all suspicion. He acknowledged, that it was a natural right possessed by the belligerent, in virtue of the necessity of self defence, and for a just precaution; he saw very well, that it was a right common to all nations, at all times, and in all places. How, then, could he imagine that a neutral vessel could fear, that by obeying the summons she should fall into the hands of enemies,

There is no cause of suspicion where the proper signals are given for search.

or pirates, when it is precisely to avoid that suspicion, that the search is preceded by all the formalities requisite to ascertain the intentions of the privateer? The case he supposes is, therefore, impossible. How, in fact, can the master of a neutral vessel, summoned by a lawfully armed ship, suspect it to be an ill-designing pirate who spreads a snare for him, when, after the signal given for the purpose, a boat is dispatched with a small number of officers, entrusted to make the search, in the manner prescribed by those laws, which Galliani calls cruel?(197) There

(197) Perhaps Galliani was unacquainted with legal principles, when by an excess of compassion, he exclaims, in page 462, "But they ought never to pronounce the confiscation of a vessel or goods belonging to any other than the obstinate and ill-advised captain. It would be in effect, to impute his acts to the owners!" The master of a merchant-vessel, being the hired agent of the owners of the vessel or of the goods, is responsible to them for the least neglect; he is not only answerable for fraud, but for the slightest faults. Dig. lib. 4, tit. 9, l. 3, § 5, *nautæ, caupones, &c.* Stypman. *Jus Marit.* par. 4, tit. 15, no. 322. Stracca, *de nautis*, par. 2, n. 4. Casaregis, *de Commer.* disc. 19. Targa, *Pond. Marit.* cap. 12, n. 27. Valin, *Ord. de France, du Capitaine.* If the master has not foreseen what, by the principles of his profession, he ought to have done, and if, from ignorance or malice, he engage in an unequal combat, he ought to be considered as culpable, and bound to make reparation for all the damages resulting from his conduct. Dig. lib. 50, tit. 17, l. 36 & 132, *de regu. Juris.* Dig. lib. 9, tit. 2, l. 31. *culpam autem, ad legem Aquiliam.* Stracca, *de nautis*, par. 3, n. 26 & 82. Roccus, *de navibus et naulo*, not. 55. Kuricke, *Jus marit. Hanseatic.* tit. 3, art. 1 & 2. Casaregis, *de Commerc.* disc. 23, n. 65. Valin, *à l'ord. de France*, art. 36, *du Capitaine.* See my work on *Mercantile Jurisprudence*, tom. 1, *Capitaine.*

Belligerents may use force against neutrals who resist a search.

is, therefore, no excuse for the disobedience or resistance of a neutral, since he can never justify his suspicions of violence and aggression from a belligerent, whose demeanour announces pacific, and not hostile intentions. In opposing, by flight, or force, the search which a belligerent has a right to make, he manifests an hostile intention, or gives just reasons to suspect a real enemy, or at least one who carries with him effects belonging to enemies, or goods contraband of war. The law of nations justifies the use of force against any one who opposes the perfect right of another. In this view, it will be lawful to pursue a neutral vessel, and, by declaring her to be good prize, to subject her to confiscation, as has been justly established by the conventional law of Europe, which, on this point, is only explanatory of the primitive and general law of nature. "In this case," says Lampredi, in treating of this question,(198) "you may employ the force necessary to overcome the obstacle "that opposes you, and, if you believe it requisite for "your safety, in order to restrain the unjust violator of "your rights, to do him as much harm as may be sufficient to prevent him from wishing to offend in "future, you may lawfully do it, provided the quantity of evil inflicted is not measured by passion, "or the thirst of vengeance, but by the mere

So that, in this case, the owners of goods, such objects of compassion to Galliani, will be reimbursed by the master, who alone will suffer the penalty of his temerity, and culpable disobedience.

(198) Lampredi, *ibid.* § 12. p. 185 & 186.

"necessity of your own defence. It is the same, in "this instance, as in a state of nature, where the "offended person is at liberty to do all the harm he "pleases to the offender. Belligerents are, there- "fore, in my opinion, very moderate, when, in the "supposed case, they leave the person at liberty, and "content themselves with siezing the vessel and car- "go of one who, without any reason, endeavours "to avoid, by flight or force, the search which the "belligerent has a right to make. I have said with- "out any reason, because a ship of war that keeps "at such a distance as may remove all fear from the "neutral, and who proves its pacific intentions, by "sending its officers in a boat, prevents all suspicion "of aggression and violence, the only excuse for flight "or resistance."

8. When a belligerent, on examination, finds the papers of a neutral vessel in due form, he ought to leave her at liberty to pursue her course without any molestation, unless there be a legal and well-founded suspicion of fraud, that may induce a more rigorous search, which may be lawfully made, observing always the most perfect moderation, and the utmost regard for the interests of neutrals.

9. Notwithstanding these principles, the manner in which the right of search is to be exercised is still a subject of controversy between belligerents and neutrals. To prevent the abuse which may be practised on these occasions, certain powers have, some-

times, made it the subject of particular stipulation in their treaties; these, being particular conventions, do not constitute a law for other nations who are not parties to them, and who have not taken the same precautions. Such was the treaty between Spain and England, in 1667, the 14th article of which has the following stipulation: "In case merchant-vessels shall be met with, in bays or on the high seas, by the king's ships, or his cruisers, they shall send their boats on board of the merchant-vessels, with two or three men only, to whom the master or captain of the vessel shall exhibit his passport, sea-letters, &c." Such is also the 4th article of the convention concluded at Petersburg, the 17th June, 1801, between England and Russia, acceded to by the courts of Sweden and Denmark; and the 19th article of the treaty of the 3d September, 1800, between the French republic and the United States of America.

10. Hubner reckons eleven sorts of papers usually found on board of a vessel.(199) Galliani and Lampredi,(200) suppose, with reason, that only five of them are necessary to prove the property of the vessel and cargo; namely, the passport, *la patent de navigation*, the muster-roll or list of the crew, *le rôle d'équipage*, the bill of sale, or the evidence of the property of the vessel, *le contrat d'achat*, the bills of lading, *le contrat de nolis*, *les connoissemens*, and the captain's certificate of naturalization, *les lettres de naturalization*.

(199) Hubner, *ibid.* liv. 1, part. 2, chap. 3, § 10.

(200) Galliani, *ibid.* § 5. Lampredi, *ibid.* § 12.

According to existing maritime usages, the passport given by a government to a ship, in order to render her respected as belonging to the nation, is not alone sufficient; it is requisite that the captain and two thirds of the crew should belong to the same nation.* The other papers of which Hubner speaks, are, the invoice of the goods, the log-book, inventory, and bill of health, which concern only the police of the vessel, or the private economy of the master, and are of no importance to the belligerent.

11. It seems to me impossible to fix the number of these documents; it would be unjust to demand more than was necessary to prove that the ship and cargo are not liable to confiscation; the whole must depend on circumstances. It is true, that proofs of

* This must not be understood as a rule of the law of nations, but as depending on the local ordinances of each country. The celebrated navigation act of England required, that the master and three-fourths of the crew, should be subjects of the king. But feeling it inconvenient in time of war, the government of that country, from motives of obvious policy, have passed temporary acts allowing the employment of three-fourths foreign seamen: and all the privileges of British subjects are conferred on foreign seamen, after two years service in time of war, on board of a ship of war, or merchant-vessel. The English courts of admiralty consider the national character of a mariner as determined, not by the place of his birth, but by the country in whose service he is employed, or the place of his domicil. The ordinance of France requires two-thirds of the crew to be French. The laws of the United States render it necessary only that the owner and master should be citizens. The nationality of a vessel, therefore, is to be determined by the ordinances or laws of the country, whose flag she bears.... T.

Proof of neutrality lies on the captured.

the neutrality of a ship ought to be unimpeachable, but the passport alone may be sufficient for the purpose, when it appears that the ship was destined for a friendly port. When the principle is admitted, that the ship covers the cargo, all investigation as to the cargo ought to cease. If it be required to prove the destination of the vessel, and the quality of the cargo, the *charter-party*, *bills of lading*, and *invoices*, may furnish the proofs. The position of D'Habreu, that all these papers ought to be found on board, is altogether untenable, as Valin(201) has well remarked. One or other of them may suffice, since, very often, masters are not in a situation to produce a *charter-party*, when a ship is not freighted entire; besides it cannot be required of the master that he should have those papers which are not customary in time of peace, if, at the time of the vessel's sailing, he was ignorant of the declaration of war.(202)

12. The proof of neutrality always lies on the captured. This proof can and ought to be derived from the papers found on board at the time of capture; all other indirect proof, either for or against

(201) Valin, *des Prises*, chap. 5, sect. 3, § 2. Hubner, *de la saisie des batimens neutres*, tom. 1, part. 2, ch. 3, § 10.

(202) See the Memoir for D. Stevenson, captain of the Danish ship *Enighed*, taken by two French vessels, in 1778, in *Hennings Sammlung de Staats Schriften*, tom. 2, p. 147.

the capture, is inadmissible.* Such is the regulation of the 11th article of a marine ordinance of France, of the 26th July, 1778; it declares, that regard should be had to the papers found on board, and not to those which may be produced after the capture. It belongs to the captor, afterwards, to prove any irregularity in these documents, and to sift them in any manner he thinks proper, in order to discover their falsity or fraud. As to those informalities which may affect certain papers on board, I shall say, with a learned lawyer,(203) that it is not on the omission of customary forms, that the prize courts ought to rely; it is by the papers taken together, and especially by the truth of the facts which result from the examination, that they ought to decide. Experience every day shews, that the utmost regularity in papers often masks simulation and fraud; *nimia precautio dolus.*

13. According to the laws and usages of France, all the papers above specified, are not necessary to

* This very rigid rule is not adopted by the English courts, nor is it consistent with justice. The papers, undoubtedly, are to be regarded as *prima facie* evidence, but they ought not to be conclusive. In case of any defect, the claimants ought to be allowed to prove their property by affidavits, and other supplementary proofs. The defects in the papers may and ought to justify the seizure and bringing in, and prevent the captor from being obliged to pay costs, in case of a restoration, and, in some cases, he may be entitled to receive costs....T.

(203) See M. Bonnemant's translation of the *Tratado juridico-politico sobre las presas marítimas*, by D'Habreu, and his notes.

What documents are sufficient to prove the neutrality of a ship.

prove the neutrality of a vessel. The 6th article of the ordinance of 1681, title, *des Prises*, declares the ship confiscable only when neither *charter-party* nor *bill of lading*, nor *invoices*, are found on board. The 13th article also forbids the detention of ships whose captains shall have exhibited their charter-party, or bill of lading.(204) The 2d article of the ordinance of 1778, has since modified the articles of the former ordinance, and a ship shall not be adjudged good prize, because any one of the three documents is not on board, if another is found that supplies its place and answers the same purpose, as to proof of neutrality. In fact, many ships have no charter-party on board, but only a passport, bills of lading, or invoices, with a muster-roll of the crew. This is the case of a *general ship*.* Others have only manifests, containing the account of all the goods on board, at the bottom of which is the passport; others have only a passport in which is set forth the proofs of property in the ship, or the declaration of the owners, the time and place of her building, the names of the shippers, the number and quality of the goods on board, the place of departure and destination of the ship, the names of the captain, officers, and sailors composing the crew, and the place of their domicil. This single paper then fulfils all the re-

(204) Valin, *Comment. à l'Ordon. de la Marine*, and in his *Traité des Prises*.

* *Un navire chargé à la cueillette.* See Pothier, *Charte-Partie*, 5....T.

Forms of passports are required by certain treaties.

quisites of the law, and supplies the place of all the others, conformably to the 2d article of the regulation of 1778.

14. The passport is a formal document, which ascertains the national character of the bearer. The form of the passport which certain neutral nations ought to have in time of war is generally inserted in their treaties with the belligerent powers, as may be seen in the treaties between France and the Hanse-Towns, of the 1st April, 1769, article 31, and in that between the French republic and the United States of America, of the 3d September, 1800; or it is prescribed by a positive law on the subject. Such is the 9th article of the ordinance of the king of Denmark, of the 4th May, 1803, and the *placard* of the same monarch, dated the 8th June in the same year, explanatory of the 9th article of that ordinance. These passports, then, ought to agree exactly with the forms prescribed, since they furnish, in a special manner, the best and most distinguishing proofs of the neutrality of the ship. Yet a variance from those forms, however essential it may be, will not be a sufficient cause for suspecting the neutrality of the vessel, and to produce her confiscation, if that neutrality should be made to appear from other documents on board, agreeably to the 2d article of the regulation of the 26th July, 1778; for the inherent defect of the passport, or its want of form, cannot be imputed to the bearer, who is obliged to receive such as the officers of government think proper to deliver. It was so ad-

Decisions of the French tribunals as to passports, prescribed by treaties.

judged by the court of *Cassation*, at Paris, relative to the capture of a Hamburg vessel, *the Young Catharine*, the 15th April, 1799, and by the new council of prizes, the 19th December, 1801, and the 4th April, in the same year, as to the capture of the Swedish ship *Elegance*, pursuant to a letter addressed to the council by the minister of foreign relations, stating, that the card of privilege or liberty given by the Swedish government to ships to navigate in the Baltic, supplied the place of a passport, when it agreed with the date of departure.

15. Another example will confirm the justness of this reasoning. The 13th article of the treaty of 1769, between France and the free city of Hamburg, renewed in 1789, which prescribes the form of passports to be delivered in time of war, and by which the neutrality of the ship is to be known, though couched in imperative terms, is, nevertheless, applicable only to the case in which the ship shall be destined to an enemy, or where its neutrality shall not be proved by other documents on board. In fact, all the penal conditions of this treaty relate only to the fraudulent commerce which the Hanse-Towns might carry on with, or for the enemies of France, and are not designed to hinder the commercial intercourse with France, to whom their flag may be of infinite use in time of war. Thus, the seizure of a Hamburg vessel bound for France, on the ground that the passport is not agreeable to the form annexed to the 31st article of the treaty, will not be valid, if it be proved by the other docu-

ments, that the vessel is really a Hamburgher. Such was the just decree of the council of prizes at Paris, the 1st December, 1800, in favour of the ship *the Young Catharine*, of Hamburg, to which the provision of the 31st article of the treaty was subjoined.*

* The French tribunals have not, in all cases during the late war with Great-Britain and the allied powers, decided on these just principles. American and other neutral vessels have been condemned merely for not having a passport in the form prescribed by treaty, or for a pretended contravention of the particular marine ordinances of France not agreeable to the law of nations, and which other independent states are not bound to observe.

As to the proofs required of neutrals by the British courts, see Robinson's *Reports of Cases decided in the High Court of Admiralty.* The only evidence, in the first instance, is the ship's papers, and the preparatory examinations of the master and mariners. If there be a contradiction between the documentary evidence and that of the witnesses, the general rule is to order further proofs; but circumstances will often determine, whether it be a proper case for further proof or not. 1 Robinson, 4, 7; 2 Robinson, 14, 15, 108, 161, 348, 355; 3 Robinson, 78, 111, 114, 122; 4 Robinson, 32, 203, 204.

CHAPTER IV.

OF THE RIGHTS OF BELLIGERENTS ON THE SEA, AND THEIR CONSEQUENCES.

ART. I.

Of Captures.

CAPTURE is the seizure of a vessel belonging to a real or supposed enemy, with the effects on board, either by a belligerent, or by some other person, to whom his government has given the power, with an intention to divest the owner of the property and to appropriate it to himself.(205)

2. In detaining, or seizing a vessel, there may be two objects in view; either to take and keep possession of the vessel and cargo, which is, properly speaking, a capture; or to seize the effects of an enemy, or goods contraband of war, on board a neutral and friendly ship, which is no more than a mere detention, without any design to injure the subjects of neutral and friendly powers.

(205) See the definition of capture given by d'Habreu, in his work, *Tratado sobre las Presas*, cap. 1, § 3, p. 2, &c. which Valin, in his *Traité des Prises*, chap. 1, § 9, considers inaccurate, though his own definition is not more exact.

Captures are just or unjust.

3. A capture may be just or unjust. It is unjust, when made by a pirate, a friend, or a neutral, contrary to the principles of the primitive or conventional law of nations. It is just, when it is made by an open enemy, and according to the laws of war. It is not the declaration of war alone, or the law between belligerent nations, that constitutes the justice of a capture: the capture of a neutral and friendly vessel is also lawful, when laden with goods destined for a port besieged, or blockaded, or the access to which is publicly interdicted even to neutrals, in case of a prohibited and contraband trade, for the prohibition previously understood, gives the right to sieze and confiscate the goods of the offenders.(206)

4. Though the laws of war authorise belligerents to commit every kind of hostility towards an enemy, wherever he may be found; yet public faith, and the universal law of nations, do not permit them to molest a vessel within the ports or bays of neutral powers. According to this principle, a capture is unjust, and consequently of no effect, if made under the cannon of a town, or a fort, or in that part of the sea comprehended within the jurisdiction of a neutral and friendly power.(207)

(206) Grotius, *de jure belli ac pacis*, lib. 3, cap. 3, § 1, and cap. 17, § 3. Heineccius, *de navibus ob vect. vet. merc. com.* cap. 1, § 9. Selden, *mare clausum*, lib. 2, cap. 20. Vattel, *Droit des Gens*, lib. 3, chap 7, § 113. Hubner, *de la saisie des batimens neutres*, tom. 1, part. 2, chap. 3, § 5.

(207) Valin, *Traité des Prises*, chap. 4, sect. 3, tot. Puffen-

Captures cannot be made within the neutral territory.

5. Some authors, even those of the highest reputation, who have written on the maritime law of nations, (I shall cite only Casaregis, because he has copied the the doctrine of the rest) relying on the practice or law observed in the chase of animals, maintain that if a naval fight has commenced on the high sea, a belligerent may pursue and capture the ship of his enemy, even under the cannon, and within the jurisdiction of a neutral power.(208)

6. If we recollect the undeniable principles laid down in the first chapter of this volume, particularly under the head of the *rights and duties of neutrals*, we shall at once acknowledge the futility of this opinion, and the weakness of the comparison. In fact, as soon as an enemy has got under the cannon, or within the territorial sea of a neutral and friendly power, he ought to be considered as in a sacred asy-

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dorf, *de jure nat. et gent.* lib. 4, cap. 5, § 6, et 7. D'Habreu, *sobre las Presas*, par. 1, cap. 5, § 13 et 16. Emerigon, *Traitè des Assurances*, chap. 12, sect. 23. See also Vol. I. of this work, chap. 2, art. 1 and 3.

(208) Casaregis, *de Commercio*, disc. 24, n. 2. *Hostium personæ et bona possunt ubique capi etiam in aliena jurisdictione, ut de feră captâ in alieno agro etiam domino agri resistente quod fiat capientis.* A. Ponte, *de Potestate Proregis*, tit. 2, n. 11. Jacobus Galea, cited by Balduc, tit. *de Assec.* decis. 4, n. 5, in tot. Roccus, *de Offic.* tit. *de Præs. class.* § 2, *de Præd.* Bon. Hott. n. 99, &c. *Et propter eandem rationem in mari quoque alteri principi subjecto depredationes fieri possunt.* Such is also the opinion of Besoldus, *de Jure territor.* cap. 3, n. 4, and of Loccenius, *de Jure maritimo*, lib. 1, cap. 8, n. 10, vers. *quin et hostilium.*

A vessel ignorant of the war going into a belligerent port, is not good prize.

lum, and under the protection of a pacific and friendly nation. If a belligerent were permitted to pursue him within the jurisdiction of neutrals, why may he not do it even to the very port, and set fire to the city in which his enemy has taken refuge?(209) Casaregis afterwards acknowledges his error, or rather, he forgets his former opinion, since he adopts a contrary one in a subsequent discourse.(210)

7. A merchant-vessel that happens to be at sea, when the nation to which it belongs enters into a war, cannot be captured on its arriving at an enemy's port, in right of the war which has supervened between the two nations. He ought then to be under the safeguard of public faith. If it be a case in which the vessel and effects may be kept or sequestered, this can be only by way of hostage, or by right of reprisal. This case has been provided for, in some

(209) D'Habreu, *sobre las Presas*, part. 1, cap. 4, § 15. Valin, *des Prises*, chap. 4, sect. 3, in tot.

(210) Casaregis, *de Commercio*, disc. 174, n. 11. *Aut naves inimicæ (et hæc est secunda pars distinctionis principalis) reperiuntur intra portus, vel sub præsidiis vel arcibus maritimis alicujus principis alieni, aut in mari ita vicino, ut tela tormenta ve muralia maritimæ arcis illuc adigi possint, tunc citra omne dubium dictæ naves hostiles, eoque minus naves communis amici principis, recognosci, visitari et deprædari sub quovis prætextu minime valent, quia dictæ naves non minus sunt sub custodiâ et protectione talis principis, quam illius subditi intra civitatis muros existentes. Optimus textus est in* lege 3, § fin. ff. *de Adquir. rer. dom. Quidquid autem eorum cæperimus, eò usque nostrum esse intelligitur donec nostra custodia coërcetur.*

Generous conduct of the Spanish.

public treaties, in which a period is fixed, to give vessels on their route time to gain information of the rupture.(211) Some facts that happened during the last war, show that well-disposed persons begin to feel the importance of that spirit of moderation which ought to reign, even on the field of battle.

8. In 1780, captain Inglis, commander of an English merchant-vessel, not knowing that the fort of St. Ferdinand d'Omoa was no longer in the power of Great-Britain, came to anchor there with his accustomed security. The Spanish commander, far from taking advantage of his mistake, had the generosity to permit him to remain three days, during which time they visited each other, and he was furnished with the provisions and refreshments of which he stood in need, in order to reach Jamaica.(212) The

(211) See *ante*, article 3, § 5, p.

(212) See the *Gazette de France*, of the 28th March, 1780. The history of the 18th century has furnished another very remarkable example of the generosity which characterises that magnanimous nation. The Abbé Raynal has preserved it in his celebrated work, *Histoire du Commerce des Européens dans les deux Indes*, liv. 14, chap. 17. In 1746, Captain Edwards, commander of the ship of war *Elizabeth*, having been shattered by a storm on the coast of Cuba, and finding himself in imminent danger of shipwreck, took refuge, in a port of the Island, and presented himself before the governor of Havanna, whom he addressed in the following manner: "I come to deliver into your hands my ship, my seamen, my soldiers and myself; all I ask is the lives of my men."— "Never," replied the Spanish governor, "never will I commit so dishonourable an action. If we had taken you in fight on the high

English knew not how to imitate this example. Their conduct during the same war, towards captain Nalin of Marseilles, commander of an armed brig belonging to M. M. Arnoux, was very different. He entered the port of Grenada, not expecting to find the English in possession of it. He was immediately informed, that he was a prisoner of war, and his vessel a good prize: all the favour he received was the permission to take his private adventure.(213) Sentiments far more noble and generous dictated the capitulation of the 12th February, 1782, for the surrender of the islands of St. Christopher and Nevis, between Count de Grasse, commander of the naval forces of France, and the Marquis de Bouillé, commander of the French Windward Islands in America, on the one part; and Sir Thomas Shirley, major-general and governor of those islands, and Sir Thomas Fraser, brigadier-general and commander of the

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sea, or on our coasts, your vessel would have belonged to us, and you would have been our prisoners; but beaten by storms, the fear of shipwreck alone has brought you into this port: I do and ought to forget, therefore, that your nation and mine are at war. You are men, and so are we; you are unfortunate, and it is our duty to pity you. Unload and make the necessary repairs to your vessel, in perfect security; if necessary, you may sell as many goods in this place, as may be requisite to defray the expences you may incur. You may then depart, and I will give you a passport as far as the Bermudas. If you are taken afterwards, you will be in our power by right of war; but, at this time, I behold you only as strangers, for whom humanity demands assistance."

(213) See the same Gazette.

Periods fixed by treaties of peace, beyond which no captures are valid.

English troops, on the other part.(214) A similar capitulation was made, the 22d of the same month, between Count de Barras, commodore of the naval forces, and Count de Flechin, lieutenant-colonel of infantry, commandant of a detachment of French troops, and Sir Michael White, lieutenant-governor of the island of Montserrat in the West-Indies.

9. As it is impossible that hostilities should cease in every place, at the moment peace is concluded; as it may happen, that many cruisers and privateers may be at sea, who are unacquainted with the event, it has been, for a long period, a wise precaution, in all treaties of peace, to fix a time, proportioned to the distance of places, after which, captures by belligerents are to be deemed void, and liable to be restored. Such is the spirit of the treaty of peace of 1570, between Sweden and the city of Lubeck; of the 12th article of the maritime treaty of 1665, between Louis XIV, and the Hanse-Towns; of the 3d article of the treaty of peace, of the 5th April, 1654, between Cromwell and the United

(214) Art. 12. "The ships and coasting vessels belonging to the inhabitants at the time of capitulation, shall be restored to them as their own property. The vessels which the inhabitants expect from England, or from the possessions of his Britannic majesty, shall be received into the said colonies, during the space of six months, and they may be dispatched in return under a neutral flag, even for ports in England, with the special permission of the governor; and if the vessels so expected should touch at any English island, the governor shall be authorised to give permits for them to come to these islands, where they may anchor."

Treaties of peace, which fix the time after which no captures are legal.

Provinces; such also is the universal doctrine founded on the primitive law of nations.(215)

10. Thus by the 25th article of the preliminary treaty of peace, of 1762, between Great-Britain, France, and Spain, it was provided, that vessels taken in the Channel and the North Seas, after the space of twelve days from the ratification, should be restored; that the term should be six weeks for captures made between the Channel and the Canary Islands; three months from the Canaries to the Equator; and six months beyond the Equator. The same provision is found in the 28th article of the preliminary treaty of peace, of 1783, between France and Great-Britain, and in the 10th article of the preliminaries with Spain; in the 3d and 4th articles of the convention of the 30th September, 1800, between the French republic and the United States

(215) Grotius, *de Jure belli ac pacis*, lib. 3, cap. 21, § 5. *Illud obiter addam inducias, et si quid est simile ipsos contrahentes statim obligare ex quo contractus absolutus est: at subditos utringue obligari incipere, ubi inducie acceperunt formam legis cui inest exterior quædam publicatio: qua facta statim quidem incipit habere vim obligandi subditos, sed ea vis, si publicatio uno tantum loco facta sit, non per omnem ditionem eodem momento se exerit, sed per tempus sufficiens, ad preferendam ad singula loca notitiam. Quare si quid interea a subditis contra inducias factum sit, ipsi à pœnis immunes erunt, neque tamen eo minus contrahentes damnum resarcire debebunt.* § 6. *Illiciti enim sunt omnes actus bellici, sive in res, id est, quidquid vi fit adversus hostem: id enim omne per induciarum tempus fit adversus hostem: id enim omne per inducierum tempus fit contra jus gentium, ut in concione ad milites loquitur L. Emilius*, apud Livium, &c. See also Brunnem, *de Pace*, dissert. 5 & 7.

If no time is mentioned, the treaty takes effect immediately.

of America; in the 3d article of the treaty of the 9th February, 1801, between France and Germany; in the 1st article of the treaty of the 29th March, 1801, between France and the king of Naples; and in the 12th article of the treaty of the 25th March, 1802, between France, Spain, Holland and England, agreeably to the 11th article of the preliminaries.

11. A treaty of peace may be formed without fixing any period for its execution, or a time may be limited, as in the treaties cited in the preceding paragraph. In the first case, many publicists agree, that it ought to take effect from the day it is signed, and that every thing captured afterwards ought to be restored; but without damages or costs, if the captor did not know of the peace at the time of the capture. D'Habreu, in his treatise on captures, maintains, rather confusedly, that in such case, the capture is good if the captor was ignorant of the peace. (216) Valin, in his treatise on captures, sect. 4,

(216) *Tratado sobre las Presas*, part. 2, cap. 11, § 3. "In our opinion, that is the strongest argument in favour of the doctrine which declares that these captures are illegal; but it is not sufficiently convincing to make us abandon the contrary opinion, which appears preferable in practice. The privateer is authorised to sieze the goods of the enemy; and as long as he is ignorant of the conclusion of a peace, he has a right to continue cruising. For that purpose, a commission is given him; it ought to continue in force until revoked by his government. His commission also contains a tacit direction to molest the enemy until otherwise ordered by his sovereign. As this counter-order is a law, the cruiser

§ 5, combats this opinion; and M. Bonnemant, in a note to page 146, refutes it in the most victorious manner. In the second case, the terms or periods fixed for the execution of treaties, have relation only to captures. Valin, in raising this question, judiciously foresees a case of exception, which it may be useful to mention in illustration of the doctrine adopted in the ninth paragraph. After stating that a capture, though made before the expiration of the limited time, would be null, if it were proved that the captor was previously informed of the peace, he adds; "this proof, nevertheless, ought to be derived "from some other source than from the declaration "of the master of the captured vessel, made at the "time of the capture, or immediately afterwards; "for such a declaration may be suspected, whether "made before or after the expiration of the limited "period. The difference which will then exist, is, "that if it be before the expiration of the time fixed, "the capture will not be the less valid, though the "fact may be found afterwards to be true; unless it "be proved that the captor really knew of the peace "at the time; whereas, if it be after the expiration of "the fixed period, the capture will certainly be sub-"ject to restitution; but without damages or costs, "unless there be proof, also, that the captor, at the "time of capture, was informed of the peace."

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is not deemed to have broken it, if he had no knowledge of its existence, and every thing which he takes until that time, is good prize." See the Translation of M. Bonnemant, p. 145.

Opinions of Bonnemant, and of M. Collet-Decotils in the council of prizes.

12. M. Bonnemant, in his notes on the treatise of D'Habreu, Vol. II, page 147, thinks, on the contrary, that when the treaty assigns a limited time at which hostilities at sea must cease, "as may be seen in the last treaty made between the French republic and England, it is necessary to adhere to what has been stipulated." M. Collet-Decotils, in his learned opinion delivered in the council of prizes at Paris, in the year 1803, relative to the capture of the English ship *Swineherd*, is of a contrary opinion, and in this he coincides with mine. He thus expresses himself, page 26; "this opinion ought not to be admitted without restriction, except in the case (which will never happen) where the contracting powers have not thought proper to take any measures, or to give any orders for the cessation of hostilities at sea; but in the other case, (which is that of the treaty between France and England) where ships are dispatched by both parties to transmit orders to their armed vessels, to forbear hostilities at the moment those orders are made known to them, there can be no doubt that a prize made posterior to this notification, though within the time limited by the treaty, ought to be restored with damages and costs, unless the captured ship was the aggressor." The council adhering to the sound conclusions of the commissary of government, declared the *Swineherd* captured by the French cruiser *Bellona*, good and lawful prize, and she was consequently adjudged to the captors. On the same principles of justice and equity, the council of prizes

decreed, the 29th September, 1802, in the case of the imperial polacre, *the Thetis*, against the French privateer *Serpent*.

13. The laws of war, by permitting the belligerent to weaken his enemy, that he may be more easily conquered, or compelled to make peace, have authorised the too cruel(217) practice of encouraging subjects to fit out privateers, at their own expence, for the purpose of capturing the merchant-vessels of

(217) I do not hesitate to give this name to a practice, at a time when the views of all governments are turned towards the prosperity of commerce, and the freedom of navigation. The evils produced by a maritime war, and the numerous fleets with which belligerents cover the seas for the purpose of doing to each other all possible injury, appear to be amply sufficient to destroy the prosperity and fetter the freedom of commerce. Let the virtuous Mably here speak, in my place, to the hearts of those nations who are compelled by hard necessity to engage in war: "I wish to "say something of those piracies exercised against merchant-ves- "sels, the moment two powers have ceased to be at peace. How "is it that nations who consider commerce as the most solid basis "of their greatness, and who make so many efforts to extend their "commercial relations, have never yet learned how much it would "redound to their advantage to enter into some mutual stipula- "tions for securing the navigation of their subjects engaged in "trade, in time of war? Ask the merchants of England, Holland, "or France, and their answer will be the same. They see with "horror the equipment of privateers, and they would hear with "the most lively satisfaction, that at the next peace, the belligerent "powers had mutually promised, in case of a rupture, not to permit "their subjects to fit out privateers, and to prohibit their ships of "war from insulting and capturing the merchant-ships of the ene- "my." *Droit Public de l'Europe*, tom. 2, chap. 12, page 312, 2d edition, 1748.

Motives for privateering.—What is a privateer.

the enemy, as well as those of neutrals suspected of having contraband goods, or the property of enemies, on board. Individuals are led to engage in this practice by the flattering hope of appropriating the property of others to their own use, not in consequence of any right of their own, but by the voluntary transfer usually made to them by their government, a portion of the prize only being reserved for the public treasury.(218) Yet, as it belongs only to the public authority of a nation to direct its forces in time of war, a vessel cannot be legally deemed a privateer, or armed cruiser, unless furnished with a commission, or what is called *letters of marque*, by virtue of which such vessel is allowed to enjoy the privileges and benefits of asylum and protection in neutral and friendly ports; and without which it would be re-

(218) Anciently a portion of all captures was offered to the gods. Abraham was the first who paid this homage to the true God, by giving a tenth of the spoils to the high-priest Melchisedeck. *Genesis*, ch. 14, v. 10. The Romans made the same offering to Jupiter. For this reason, according to Livy, he received the name of *Jupiter Prædator*, lib. 5, decad. 1. Virgil alludes to this practice in the third book of the Æneid, l. 222:

Irruimus ferro, et Divos ipsum que vocamus
In prædam partemque Jovem .....

According to the testimony of Cæsar, in the sixth book of his *Commentaries*, the people of ancient Gaul made this offering to the god Mars.

garded as a pirate, or sea-robber, as will be seen hereafter, in its proper place.*

ARTICLE II.

Of the Legal Property in Captures.

§ 1. ONE of the modes of acquiring property in a thing, is by occupation; and among the different kinds of occupancy, is one derived from the law of nations, by which a sovereign, and those to whom he delegates his power, acquire the dominion, or to speak more precisely, a property in things captured in a just and lawful war. Thus it is universally established by the law of nations, that whoever makes war in form, and with public authority, becomes the proprietor of whatever he takes from the enemy. (219)†

* In addition to the books cited by the author, in relation to captures, the reader is referred to a "Treatise on Captures in War," by Sir Richard Lee, taken chiefly from Bynkershoek's *Quæstiones Juris publici;—An Essay on Privateers, Captures, and Recaptures,* by *M. De Martens,* translated (1801) by T. H. Horne. The rules adopted by the English relative to prizes, and the mode of proceeding in their prize-courts, are fully detailed in *Robinson's Reports,* and Brown's *Civil and Admiralty Law,* Vol. II. ch. 6 and 7. See also a paper drawn up by Sir William Scott and Sir John Nicol, at the request of the American minister, dated the 10th September, 1794, published in the Gazettes of the United States....T.

(219) *Jure gentium non tantum is qui ex justa causa bellum gerit; sed et is qui in bello solemni et sine fine modoque, dominus fit eorum quæ hosti eripit. . . . . Quod dominium quoad effectus exter-*

Things lawfully captured belong to the captor.

2. It may be objected to this principle of jurisprudence, that the delivery of a thing cannot transfer the property, unless it be made by the owner himself, or with his consent. But there are several exceptions to this rule, one of which is, that when the effects of a debtor are taken and sold by his creditors, notwithstanding any opposition on his part, the delivery of them on such sale, made pursuant to the judgment of the court, will have its full and legal effect, though done without the consent of the debtor, who was the true proprietor, since the authority of the judge, in this case, supplies the want of his consent.(220) Whoever, therefore, under the sanction of public authority, and in conformity to the laws of war, exposes himself to the dangers necessary to make himself master of an enemy's ship, may, by this act, be enabled to secure the property to himself.(221) Now, if belligerents have, by the laws of war, the right of making captures, wherever they find enemies, as will be shewn in a subsequent article, the

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nos licet apellare." Grotius, *de Jure belli ac pacis*, lib. 3, cap. 6, § 1 & 2. Puffendorf, *de Jure nat. et gent.* lib. 8, cap. 6. Vattel, *Droit des Gens*, liv. 3, chap. 13. Selden, *Mare Clausum*, lib. 2, cap 2. † Rutherforth's *Institutes of natural law*, book 2, chap. ix. § 16.....T.

(220) *Non est novum, ut qui dominium non habent alii dominium præbeant; nam ei creditor pignus vendendo, causam dominii præstat quum ipse non habuit.* Dig. lib. 41, tit. 1, l. 46, *de adquirendo rerum dominio.*

(221) Grotius, *de jure belli ac pacis*, lib. 3, cap. 6.—Vattel, *Droit des gens*, liv. 3, ch. 9.

captor, beyond doubt, ought to be made secure by the same law, and remain the lawful proprietor of the thing captured.

3. It follows from these principles, that a privateer, acknowledged by public authority, when it captures the vessel of an enemy, according to the laws of war, acquires by that means, the lawful property in the vessel.(222) It is a general maxim of Roman jurisprudence, that things taken from an enemy, immediately become the property of the captor. "*Quæ ex hostibus capiuntur statim capientium fiunt.*"(223)

4. The writers on public law, however, are not agreed among themselves, as to the precise time at which the possession of the prize really transfers the property to the captor. Some assert, that the property in the thing captured commences at the very instant of taking possession, in whatever manner it may be, without the necessity of any interval of time for that purpose, and even before the prize is carried to a place of safety.(224) There are others who maintain, that the captor cannot be con-

(222) Grotius, *ibid.* lib. 3, cap. 6, § 1 and 2. Puffendorf, *ibid.* lib. 6, § 17. Vattel, *Droit des gens*, liv. 3, ch. 13.

(223) Institut. lib. 2, tit. 1, § 17, *de rerum divisione.* Dig. lib. 41, tit. 1, l. 5. § 7, *de acquirendo rerum dominio.*

(224) Burlemaqui, *Principes du Droit Politique*, part 6, ch. 7, p. 16. Luzac, on Wolfius, § 1204.—D'Hubreu, *Tratado sobre las presas*, part. 1, cap. 3, § 5.

sidered as the unchangeable proprietor of the thing captured, until after it is carried into a place of safety, and beyond the pursuit of enemies; thus he is the true possessor of it while on the high seas, but not the proprietor, because, he is liable to be deprived of the prize by the same law in virtue of which he made himself master of it.(225)

5. The latter opinion may find support in certain principles of the Roman jurisprudence. The word *capere*, which signifies, to take, ought to be understood of a capture which has had its effect, *capere cum effectu accipitur*.(226) Thus a prisoner of war did not become really such, nor cease to be a citizen, until he was carried into the enemy's camp, *infra præsidia*, or into the city of the enemy, *ubi fines nostros excessit*; until which time he was supposed by law to remain free, *manet civis*.(227)

6. Notwithstanding the contrariety of these opinions, the present practice among all nations is to con-

(225) Grotius, *ibid.* § 3. Puffendorf, *ibid.* lib. 8, cap. 5, § 17. Vattel, liv. 3, ch. 13, § 196.

(226) Dig. lib. 50, tit. 16, l. 71, *de verborum significatione.—Aliud est capere aliud accipere. Capere cum effectu accipitur. Accipere est, si quis non accepit, ut habeat. Ideoque non videtur quis capere, quod erit restiturus, sicut pervenisse proprie illud dicitur, quod est remansurum.*

(227) Dig. lib. 49, tit. 15, l. 6, § 1, et l. 19. § 3, *de captivis et postliminio.*

Twenty-four hours undisturbed possession vests the property in a prize.

sider the property in the thing captured as acquired, when the captor has been able to keep it in his undisturbed possession for the space of twenty-four hours, without rendering it necessary to carry it to a place of safety. The principles of the civil law, may be cited in support of this universal doctrine; according to them the word *statim* is understood to mean a certain interval of time. *Quod dixi statim cum aliquo temperamento temporis intelligendum est.*(228)*

7. Thus the laws of war give the victor the full right of property in the goods he takes from an enemy: *quod occupatio bellica sit modus adquirendi dominium,* say all the writers on public law; and according to this incontestible principle of the law of nations, the property in things moveable is acquired by the belligerent the moment they are in his power. If he sell them, even in a neutral nation, the first owner, though present, has no right to reclaim them. Such is the general rule, derived from the principles above laid down; it is adopted by all publicists.(229)

(228) Dig. lib. 35, tit. 2, l. 1, § 8, *ad legem Falcidiam.* Dig. lib. 46, tit 3, l. 106, *de solut. et liber.* De Franchis, *Decis. Neap.* decis. 368, n. 3, ibid. *De Luca,* n. 3. Marquardus, *de jure mercatori,* lib. 2, cap 3, n. 40. Casaregis, *de commercio,* disc. 24, n. 7 and 8.

* The rule of twenty-four hours possession, though prevailing on the continent, seems not to have been adopted in England. See note next page. Brown's *Civil and Admiralty Law,* Vol. 2, p. 242...T.

(229) Casaregis, *de commerico et mercatura,* disc. 14, n. 1. Vattel, *Droit des gens,* lib. 3, ch. 14, § 195 and 196. Burlemaqui,

Goods purchased from an enemy, become the property of the purchaser.

M. Bouchard, the learned professor of public law at Paris, has expressed himself on this subject in the following terms: "When moveables pass from an "enemy to other hands, in the way of trade, in what-"ever place they may be, they belong to the pur-"chaser, and the former owner cannot reclaim "them, though he finds them in a neutral country, "or even in his own."(230)*

8. This is the place to discuss the question as to the *jus postliminii* already agitated by many publicists, and last by the learned M. Martens, in his *essay on privateers, &c.* in which, chapter 3, § 44,

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Droit de la nature, part. 4, chap. 7, n. 14 and 25. Grotius, *de jure belli ac pacis*, lib. 3, cap. 6. Puffendorf, *Jus naturæ et gentium*, lib. 8, cap. 6.

(230) Bouchard, *Theorie des Traites*, ch. 5, sect. 2.

* The English courts consider a *sentence of condemnation* by a court, constituted according to the law of nations, as requisite to change the property so as to bar the claim of the original owner, in favor of a vendee or recaptor. Burrow's Reports, Vol. II, p. 694, *Goss v. Withers*. Robinson's *Admiralty Reports*, Vol. I, p. 135, Vol. III, p. 96, and note 97. The assertion to the contrary by Albericus Gentilis and Grotius, is contradicted by the opinion of Sir Leoline Jenkins. See his *Life and Works*, Vol. II, p. 770. Bynkershoek (*Quæstiones juris publici*, lib. 1, c. 5) and Vattel (lib. 3, c. 13) are of opinion that the property must be truly and actually in the enemy's power, and carried *infra præsidia*, or to a place of safety. What shall be deemed *infra præsidia*, or a place of safety, may still be matter of doubt. The rule requiring a sentence of condemnation, as the title-deed, or evidence of property in the vendee of goods purchased of a belligerent, seems, on the whole, to be the most certain and convenient....T.

he maintains the opinion,* before expressed by Cocceius, in his dissertation *de postliminio in pace*, sect. II, § 5. The limits I have prescribed to myself, in this work, do not permit me to enter into the examination of this question to the extent it deserves. I shall content myself, therefore, with announcing my opinion without any discussion, in order to avoid an useless repetition of principles already laid down upon this subject. Grotius, in treat-

* The opinion of M. Martens, which he supports by reasons drawn from general principles, is, "that according to the law of nature, without making any distinction between conquest, booty or prize, the goods taken by the enemy, however legal that capture might be, however certain the possession, do not become his full property till the moment of peace; and that during the whole course of the war, it may be claimed by the first proprietor from the hands of every third possessor." Cocceius and Martens are not the only writers who have doubted of the principle adopted by Grotius from the Roman law, and which was evidently founded on reasons of policy. Puffendorf (lib. 4, cap. 6, § 14) is of opinion, that no perfect and valid right of property is acquired in things taken in war, until the claim of the original owner is renounced by a general peace. Rutherforth, in his *Institutes of natural law*, (book 2, ch. 9, § 16,) considers this to be the general opinion of mankind in regard to immoveables, as towns, provinces, &c. He can see no reason, except that of convenience, why moveables should not be subject to the same rule. And Martens observes, that the loco-motive quality of moveables cannot alter the general right of property, and the right of the first proprietor still remains, though in a dormant state. He considers, however, the practice of Europe as different, and offers this as a theory sound in principle, but not sufficiently acknowledged or adopted to be assumed as the basis of a legal system on the subject.....T.

The jus postliminii cannot take place among neutrals.

ing of this question, says,(231) that in regard to things moveable, it is a general rule, that they do not return to their former master by virtue of the *jus postliminii*, but make a part of the booty in war. Thus, when they have passed from an enemy into other hands by means of commerce, wherever they may be, they belong to the purchaser, and the former owner cannot reclaim them, though he should find them in a neutral country, or even in his own. In fact, the *jus postliminii* cannot take place among neutral nations, for whoever intends to remain neutral, is bound to consider the war, in regard to its effect, as equally just on both sides, and consequently, every thing taken by either of the belligerents, as fairly acquired. To give to one the right of reclaiming things taken by the other, or the *jus postliminii*, in his territory, would be to declare himself in favor of that party, and to abandon his neutrality. Now, the neutral sovereign continuing in this manner, to be the impartial friend of both of the belligerents, the latter are bound to observe a similar conduct towards him: " Add, to this," says Vattel,(232) in discussing this point, " that the little hope that remains of recovering the things taken from an ene-

(231) *De mobilibus generalis in contrarium regula est, ut postliminio non redeant, sed in præda sint..... Quare et commercia parata (selon Gronovius empta et permutata) ubicumque reperiuntur, manent ejus, qui emit; nec apud pacatos reperta aut intra fines perducta, vindicandi jus est veteri domino.* Grotius, *de jure belli ac pacis*, lib. 3, cap. 9, 14.

(232) Vattel, *Droit des Gens*, liv. 3, ch. 14, § 209.

Things taken from neutrals must be adjudicated by a competent court.

my and carried into a place of security, makes it reasonable to presume, that they are abandoned by the former owners. It is with reason, therefore, that moveables or booty, are excepted from the *jus postliminii*, unless they are retaken from the enemy immediately after he has seized them; in this case, it is neither difficult to know them again, nor can the proprietor be supposed to have relinquished them."

9. As to the capture of neutral and pacific vessels, in any of the cases supposed in the course of this work, it is a maxim in general use, that no privateer or cruiser can appropriate them, or take any thing from the prize, before the capture has been adjudged legal by magistrates, delegated for this purpose, by public authority. This law of war, recognised by the conventional law, is agreeable to the principles of the primitive law of nations; because it is perfectly just, that the captor should not be a judge in his own cause, and that the person from whom the thing has been taken, should not be deprived of the means of making good the defence he may allege against the validity of the capture.(233)

(233) Struvius, *Exercit.* 39, § 51. Heineccius, *de navibus ab vect; vel. merc. comm.* cap. 11, § 16.

The competent tribunal to decide on captures from neutrals.

ARTICLE III.

Of the competent tribunal to decide on the legality of the capture of neutral vessels.

§ 1. THE celebrated question, who is the competent judge of the legality of captures made from neutrals, has been embarrassed by the discussions of the authors who have treated of maritime affairs.

2. All former writers on public law were persuaded, that the right of deciding on captures, belonged exclusively to the tribunals of the belligerents. Hubner(234) first endeavoured to point out the error of that opinion, and to establish, too confusedly it is true, a contrary doctrine, which would, perhaps, have prevailed, had he taken more pains to exhibit it. Galliani went still further: he asserts, "that there is absolutely no other competent judge of the legality of the capture of vessels and goods on the coasts of a neutral state, or on the high sea, but the sovereign of those subjects to whom the captured vessel belongs."(235) Lampredi contends very strongly against the opinion of these writers. He thinks it is altogether just and reasonable, that the sovereign, whose subjects have made the capture,

(234) Hubner, *de la saisie des bâtiments neutres*, tom. 2, part. 1, ch. 1 and 2.

(235) Galliani, ch. 9, § 8, p. 403, 404.

should decide on its legality, whenever the prize is brought into the ports of his dominions.(236)

3. The prolixity with which these writers have treated of this subject, with no other view than to contradict each other, will not allow any analysis to be made of their arguments. Those who are engaged in the study of maritime law, may exercise their minds, by endeavouring to discover which of them is in the right. According to my judgment, all are in the wrong; because none of them has thought proper to recur to the principles of the primitive and conventional law of nations, to make the distinctions which the diversity of cases requires, and to connect them with his doctrine. Those principles I shall take for my guide, in the investigation of this important question of maritime law. It seems proper, therefore, to call to mind some of the maxims advanced in the course of this work, to deduce from them such rules as may elucidate the question, and serve to combat the contrary doctrines, as well as to give weight to my own opinion, which, on some points, will be opposed, and in others, conformable to what has been expressed by these authors.

4. Allowing the extent, given in the first chapter of this work, to the territorial sea, subject to the jurisdiction of a nation, it must be accompanied with all the natural incidents of property, especially the

(236) Lampredi, *del commercio de' popoli neutrali in tempo di guerra*, § 14, p. 208.

rights of protection, safeguard and defence, which consist in repressing all violence, and every attack, not only against the subjects of the nation, but against those of the nations at war, within such jurisdiction. It is, therefore, an incontestible principle, that belligerents are not allowed to make prizes within the extent of the territorial sea belonging to a neutral state.

5. Though most of the writers on maritime law have agreed in saying, that, in virtue of the right which a nation possesses over its territorial sea, it may establish imposts, permit or prohibit navigation, seize vessels, confiscate merchandize, punish according to its own laws, all crimes committed within its territory, and in a word, exercise every act of sovereign jurisdiction; yet they assert, with equal confidence, that a government cannot prevent the vessels of belligerents from capturing each other within such jurisdiction, when they are beyond the reach of cannon shot, and without the ports of the neutral nation.(237) According to this hypothesis, a captor might carry his prize into one of the ports belonging to the sovereign of the territorial sea in which it was made, and in case the master of the captured vessel should have recourse to the tribunals of the place, to obtain a decision on the illegality of capture, the captor would have a right to object the want of a jurisdic-

(237) To see at once the inconclusiveness of these principles, it is only necessary to reflect on what has been said in article 4 of the first chapter (Vol. I.) of this work.

The neutral sovereign may inquire as to captures brought into his ports.

tion in the court, on the ground that a privateer duly authorised by its government, continued to depend on that government in whatever place it might happen to be, and could not be subjected, without its consent, to a foreign jurisdiction.(238)

6. It is not difficult to reconcile these contradictory maxims, without attacking the right of jurisdiction which a nation may claim over its own territory; for a ship of war may preserve a perfect independence in regard to whatever may concern its interior discipline, nor can the government, or sovereign of the port into which it has entered, subject any of the ship's company to the civil laws of the state, much less oblige them to release a lawful prize; but this does not deprive the sovereign of the port from taking cognisance of the fact, with the sole view of ascertaining whether or not the capture was made within his immediate territory or jurisdiction, and whether there has been any infringement of those rights of sovereign protection which he is bound to afford within his territories to all, even to foreigners, when they neither disturb good order, nor are guilty of any infraction of the laws.

7. The prerogative which exempts a ship of war or privateer from the jurisdiction of the sovereign

(238) Loccenius, *de jure maritimo*, lib. 2, ch. 4, § 6 et 7. De Hevia, *comner. navalis*, lib. 3, cap. 3, n. 16, et in *Curia philippica*, part 1, § 4, n. 25. Roccus, *de officio prafecti classis*, n. 51. Targa, *pond. marit.* ch. 100, § *in ordine*. Kuricke, *Question. illust.* quest. 27. Casaregis, *de commercio*, disc. 174, 82, 415.

Of the adjudication of prizes carried into a neutral port.

into whose port its prize is carried, ought to have effect only in the case where the prize may belong to an enemy, or the subjects of an enemy, and not when the sovereign of the port into which it is carried, or some other neutral power, is interested in the prize, or where it belongs wholly to a neutral, which is a different case. In the first case, supposing that prizes may be made within the territorial seas of another nation, with the restrictions before mentioned, that is to say, beyond the reach of cannon shot, which, in my opinion, is the same as on the high sea, the validity of a prize, carried into the ports of the sovereign of this part of the sea, cannot there be questioned. The captor becomes the lawful proprietor of the prize, by right of possession; and to obtain an adjudication to that effect, he has only to present himself before the courts of his own nation, where every thing will speak in his favour. The verification of the capture secures to him the property, because the prize carries with itself its own condemnation.(239)

8. But a very different manner of proceeding is necessary in order to declare a neutral vessel, or goods

(239) *Ut enim victor intra propria præsidia tutus est ita, si amici fidem elegerit et in ejus præsidia, se et sua contulerit etiam illic publico nomine tutus erit. Is vero cui res illæ jure belli ademptæ sunt frustrà eas in communis amici territorio repetitum venit; quod enim belli sors occupanti dedit in pacato loco apud communem amicum merito sibi servabit.* Loccenius, *de jure maritimo*, lib. 2, cap. 4, § 6. Vattel, *Droit des gens*, liv. 3, ch. 7, § 132. Hubner, *de la*

The neutral sovereign may decide on captures from neutrals.

of neutrals found in an enemy's ship, good prize. In that case every thing must be conducted according to the rules of the most exact justice. To support the legality of the capture, the captor ought to give, not mere equivocal evidence, but the most satisfactory proofs of a violation of the laws of neutrality. For this reason, it appears to me, that a privateer that carries neutral vessels into a foreign port, either on account of the nature of the cargo, or of the flag, or for any other cause, ought not, when a claim is put in by the master, to refuse to submit to the jurisdiction of the sovereign of the place, as to every thing which concerns the interest which the subjects of neutral powers may have in the enemy's ship, and more especially, as to what belongs to the subjects of the sovereign of such port.(240)

9. This jurisdiction of the sovereign of the port into which prizes of this nature are carried, is so agreeable to the principles of universal reason, that the powers of Europe, in order to destroy its effect, have been obliged, from time to time, to make it the subject of a particular article in their treaties, and to stipulate expressly, that the ships of war of the contracting parties, might freely carry the prizes captured from their enemies, wherever they pleased, with-

saisie des batimens neutres, tom. 2, ch. 3, § 6. Lampredi, *del commercio de' popoli neutrali in tempo di guerra*, p. 208.

(240) Hubner, *de la saisie des batimens neutres*, tom. 2, part. 1, ch. 1, § 2, et ch. 2, § 5. D'Habreu, *Tratado sobre las presas*, part. 2, ch. 3, § 3 et 4.

This doctrine confirmed by treaties made on the subject.

out any inquiry being made into their legality, by the tribunals of the ports into which they might enter. (241) Such a stipulation would have been superfluous, if the sovereign of the port into which the prize was carried had not a right to take cognisance of it. But what still further supports my assertion is, that this has been the practice of the different nations of Europe, when not tied down by treaties to the contrary ;(242) and, especially, when we find, in later times, this stipulation in several public treaties made

(241) Such is the 23d article of the treaty of the Pyrenees in 1658 ; the 22d article of the treaty of commerce, concluded in 1662, between France and Holland, and the 14th article of that of 1739, between the same powers. Such, also, is the 9th article of the commercial and maritime treaty, made at Nimeguen the 12th October 1679, between Charles XI, king of Sweden and Holland. The 21st article of the treaty of 1714, between Spain and Holland, more particularly mentions the case in which the Dutch might carry the prizes they might take from their enemies into the ports of Spain, and renews the prohibition to all the local magistrates from taking any cognisance of the validity of such prizes. The same convention was made, in 1725, between Spain and the emperor.

(242) Several examples may be cited. In 1747, a Genoese pink took a Savoyard tartan, laden with merchandise, which was condemned as good prize by the court in Porto Longone. A Catalonian ship, in 1745, made another prize, which was carried into the port of Cagliari, where the regent of the Royal Audience, as the competent judge of maritime captures, took cognisance of the case, and decided on the validity of the capture. In September, 1747, a Savoyard privateer took two Neapolitan vessels, and carried them into Civita Vecchia, where one was adjudged good prize, and the other released. See Hubner, tom. 2, ch. 1, § 7.—See the subsequent article, *of the ransom of prizes.*

by maritime powers, the most engaged in maintaining and protecting the liberty of commerce, and in restraining the immoderate pretensions of belligerents.(243)

10. These principles being established, it seems proper to point out the principal and most usual cases, in which the sovereign of the territorial sea, becomes the legal judge of the prizes made between two parties, who are not his natural born subjects. This is either when the captor and the captured are both belligerents and enemies to each other, or when one of the two claims his protection, in consequence

(243) The 23d article of the treaty of friendship, navigation and commerce, between France and Russia, dated the 31st Dec. 1786, and ratified the 11th January, 1787, has the following stipulation: "In case such merchant vessel, so searched on the high sea, has on board goods contraband of war, it shall not be lawful to break open the hatches, nor to open any case, chest, bale, box, or cask, nor disturb any thing in the ship. The master of such vessel may, if he think proper, deliver on the spot the contraband articles to the captor, who shall content himself with such voluntary delivery, and not detain, molest or disturb in any manner the vessel or crew, who shall thereupon be immediately dismissed, and suffered to pursue their voyage with perfect freedom. But if the master shall refuse to deliver up the contraband goods laden on board, the captor shall only have the right to carry the vessel into a port, where he shall institute the proper process before the court of admiralty, according to the laws, and forms of proceeding used in such place, and after they have pronounced a definitive sentence, the goods only which are found contraband of war, &c." The same convention is to be found in the 22d article of the treaty of navigation and commerce, made the 6—17th January, 1787, between Russia and the king of the two Sicilies.

Pirates, or privateers guilty of great atrocities, may be judged by neutrals.

of his neutrality. As these two cases will exhibit my opinion, I shall proceed to enter more into detail, and with the more readiness, because I shall be able, by this means, to reconcile the doctrines of writers who have contradicted each other, though at bottom their principles were the same.

11. When the master of a captured vessel, carried by force into any port, demands justice against the privateer, as not being a lawful cruiser, but a pirate, or sea-robber, the government of the place may and ought to decide on the question, and establish a prize-court for the purpose; for the obvious reason, that a pirate being an enemy of the human race, every nation has a right to cause him to be seized, tried, condemned and punished, with all the rigor of the law, and to rid the earth of such a pest.(244) It is the same in the case, where, though unable to prove the privateer unauthorised, he may shew that the captain has conducted himself more like an infamous pirate, than an honorable warrior; because every sovereign, who has it in his power, has a right to punish and repress such excesses. Thus if the captor has violated the laws of nature, which are universal and sacred, even among enemies; if he has, without necessity, exercised the most atrocious cruelty on board the captured vessel, every neutral sovereign may justly interpose for the safety of the unfortunate crew, may take the prize out of the hands

(244) Galliani, ch. 9, § 8. Lampredi, § 14.

Privateers violating the laws of neutrality may be judged by neutral courts.

of the monster guilty of these atrocities, and even arrest him, if it should be necessary, for that purpose.

12. The competency of this jurisdiction will be still more clear, in regard to a privateer, that, in searching a neutral vessel, has violated the laws of neutrality, either by capturing her within cannon-shot, or in destroying the papers which evinced the innocence of the cargo, in order that no proofs of its neutrality might appear. In this, as in all similar cases, reason demands, that the delinquent should be tried by the magistrates of the place where he may be found, though the crime, or violence of which he is accused, was commenced beyond their territory.(245) If the commander of a privateer, who carries in a neutral prize, be accused of violating the laws of neutrality of the state, within which he happens to be, he can never except to the jurisdiction of the local tribunals, on account of his not being a subject of the state, or plead his privilege as the commander of a ship of war; because, the first of these two exceptions does not take away the jurisdiction of the place where the crime has been committed or consummated;(246) and the second is only a prerogative of that

(245) Code, lib. 3, tit. 15, l. 1. *Quæstiones eorum criminum quæ legibus aut extra ordinem coërcentur, ubi commissa vel inchoata sunt, vel ubi reperiuntur, qui rei perhibentur criminis, perfici debere satis notum est.*

(246) *Ut si quis in uno loco rem aufert in alio in custodiam suam defert..... At ex facto suo si quid in transitu (peregrini) con-*

Another instance given by Galliani.

military command which he has on board of his ship, and does not exempt him from the justice of the local tribunals, if he has been guilty of any offence, or crime against the laws of the state.(247)

13. Galliani cites another case where a neutral power has a competent jurisdiction over a privateer, or ship of war of one of the belligerent parties. "Sup- "pose," says he, "that a belligerent has the ill- "founded pretension and insupportable arrogance to "believe, that he may lawfully confiscate, not only "the goods of enemies found in neutral ships, but "the ship itself and its whole cargo; if there be "found on board goods belonging to the subjects of "that neutral power into whose port the prize has "been carried, the sovereign of such port has full "right to compel the release of such goods, and to "restore them to the owners, his subjects, on their "making due proof of their property. The reason "is evident. It is absurd to pretend *that the effects* "*of enemies draw after them the confiscation of the* "*goods of a friend.* It is a maxim not to be found "in any treaty between sovereign and sovereign, "and which has never been adopted by neutral na- "tions; it is as contrary to sound sense, as to the "universal law of nations, and the practice would be

traxerunt, vel deliquerunt, conveniri et detineri possunt; illud enim sub potestate ejus territorii continentur, atque inde fundari potest. Henric. Cocceius, *Dissert. de fund. in territ. et plur. locor. concurrent. pot.* tit. 4, § 7 et 9.

(247) See note 1, chap. 2, Vol. I, of this work.

" no better than robbery. The sovereign of the ter-
" ritory within which the privateer carries his prize,
" cannot, then, refuse his subjects the aid of his au-
" thority, in recovering property unjustly taken from
" them. In regard to the claims of those who are
" not his subjects, he can only refer them to the tri-
" bunals of their own sovereigns. Thus I am of
" opinion, that the sovereign of the port where the
" prize is found, must limit his rights in regard to the
" privateer, to compelling a restitution of the goods
" belonging to his own subjects, that have been seiz-
" ed on board of a neutral vessel, without allowing
" any other adjudication or interference with the
" prize; for that would be a proof of partiality."(248)

14. Lampredi, who, always, opposes Galliani, lays down some general maxims, for the purpose of proving, that a neutral sovereign has no right to erect himself into a judge of the legality of prizes, carried into his ports; for this reason, that if the commander of the privateer has not acquired the property, he is, at least, in possesion of the prize. He observes, afterwards, that the *jus postliminii* cannot apply to prizes taken by belligerents, and sent by the captor himself, or forced by the perils of the sea, into the ports belonging to a neutral or friendly power. In support of this opinion, he cites the authority of Cuneus and Heineccius against that of Albericus Gentilis, and concludes with saying; " He (the neutral

(248) Galliani, p. 409, 410.

" sovereign) ought, therefore, to respect the title of " possession, and leave to the natural judges of the " captor, to decide on the legality or illegality of the " capture, and to release or condemn the prize, pro- " vided, such judgment be rendered out of his own " territory, within which no person is allowed to in- " croach on his sovereign authority. The assertion " of Galliani, therefore, is an error in law, and the " execution of his plan for the adjudication of prizes " would infringe the rights of sovereigns."(249)

15. It would take up too much time to refute some of the arguments of Galliani, and to show the

(249) Lampredi, p. 228, 229. M. de Sainte-Croix, in his excellent work, entitled, *Histoire de la puissance navale de l'Angleterre*, tom. 1, p. 190, in speaking of the decision of prizes, proposes the plan which had already been pointed out by Hubner, in his work, *de la saisie des batimens neutres*, tom. 2, p. 56. " Such " causes," says he, " ought to be decided before a permanent " and neutral tribunal, which should be established, not in every " commercial place, but only in some independent city. Deputies " should be chosen by all the nations of Europe, as members of this " *Amphyctionick* council, the seats in which should be refused only to " the representatives of the parties interested. This institution is " now become the more necessary, as the security and freedom of " navigation are the chief objects of modern policy." Such is the source from whence Galliani has drawn his project of an *Amphyctionick* council of prizes, which he has offered as the invention of his own genius. M. Martens, in his *Essay on Privateers, &c.* ch. 2, § 35, considers the plan as specious, but thinks, besides the difficulties to be encountered in its execution, it will not remove the doubts concerning the principles on which this tribunal is to decide. But if it is possible to agree on such an institution, why may they not agree also to establish beforehand, all the principles on which the court is to decide?

The fourteenth and fifteenth articles of the Ordinance of France as to prizes.

inconclusiveness of those which Lampredi has urged against him. To explain my own sentiments on this subject will be sufficient, and in doing this, I shall combat the opinion of a celebrated writer: Every person may easily see, that the first has discovered the principle, without taking the trouble to place it in its full light, and that the second, has entirely mistaken the road which would have led him to it.

16. The marine ordinance of France, of 1681, will serve as a guide to my opinion. The 14th article of the title, *des Prises*,(250) forbids any vessel taken by a captain having a commission from a foreign government, from remaining longer than twenty-four hours in the ports or harbours of the kingdom, unless detained by tempest, or unless the prize has been taken from the enemies of France. The 15th article,(251) declares, that if there shall be found on board of vessels, taken and carried into the ports of France by a ship of war under a foreign commission, any goods belonging to subjects or allies of France, the goods belonging to the former shall be restored

(250) "Aucuns vaisseaux, pris par capitains ayant commission étrangère, ne pourront demeurer plus de vingte-quatre heures dans nos ports et hâvres, s'ils n'y sont retenus par la tempête, ou si la prise n'a été faite sur nos ennemis."

(251) "Si dans les prises amenées dans nos ports par les navires de guerre armés, sous commission étrangère, il se trouve merchandises qui soient à nos sujets ou alliés, celles de nos sujets leur seront rendues, et les autres ne pourront être mises en magasin ni achetées par ancun personne, sous quelque prétexte que ce puisse être."

Opinion of Valin, expressed in his commentaries.

to them, and the latter shall not be put into any warehouse, nor be purchased by any person, under any pretence whatever.

17. Valin, in his commentary on these two articles, instead of looking for the motive of such a regulation, in the principles of the law of nations, assigns the plausible reason, that this restitution is a just recompense for the asylum given by neutrals to the captor, when the latter seeks refuge in their ports, in order to avoid a storm, or any other accident. Aside from this reason, he is of opinion, that there is no ground for such a restitution.(252) This is returning almost to the opinion of Lampredi.

18. Notwithstanding the merit of the commentaries of M. Valin on the *marine ordinance of France*, it appears to me, that it is only necessary to weigh, without prejudice, his sentiments on this point, and the reason he adduces in support of them, in order to determine in favor of the contrary opinion, as the

(252) "We see no other motive for this regulation but the plausible reason which regards the restitution of the effects as a just recompence for the service rendered to the captor, in granting him an asylum. For, in short, if the prize were taken by an ally or confederate from a common enemy, or even by a stranger from his particular enemy, and voluntarily brought into one of our ports, this would be no more a case in which the effects belonging to the subjects of the king, and found on board, should be restored to them, than if the captor had carried his prize into one of the ports of his own sovereign." Valin, *Comment. à l'Ordon. de France*, 1681, art. 15, tit. *des Prises*, tom. 2, p. 279.

most universally adopted, at the present day, and as the most reasonable in itself. That opinion is, that the obligation to restore, in this case, is founded on the universal law of nations. In fact, if a foreign privateer, voluntarily entering a neutral port, without being driven in by necessity, but merely to obtain supplies of provisions, is not bound to restore the effects belonging to the subjects of the sovereign of the port, I do not see why he should be obliged to do so, in case he has been compelled to put in there; for it seems to me, that he has so much the more right to that pity and regard which is due to the unfortunate, as the cause that has forced him into the port was irresistible and disastrous. Besides, will not the opinion of M. Valin, give rise to numerous controversies between the captor and the subjects of the sovereign of the port, who claim the captured effects? If, on the one side, it is easy to prove that the privateer took refuge in the port, in order to avoid a storm, on the other, there may not be the same facility in proving, among so many motives of pressing necessity, which of them induced him to enter, since these motives, though possibly real, may be feigned with no little address. Thus, whatever may be the motive of a privateer's entering a neutral port, the sovereign of the place, will have the same right of causing the goods belonging to his subjects to be restored to them.

19. Valin farther rests his opinion on the provision of the 7th article, of the same title of the ordinance, which declares good prize every vessel laden with effects belonging to the enemies of France, and

Further remarks on the opinion of Valin.

the goods of subjects or allies found in the ships of an enemy ;(253) and to prove that the restitution, directed by the 15th article, is a matter of mere propriety, as a recompense for the service rendered to the captor in granting him an asylum, he adds, that, if the French are not allowed to reclaim effects belonging to them found on board of an enemy's ship captured by a French cruiser, neither will they be permitted to assert this claim, when the capture is made by a stranger, whether an ally or neutral, from an enemy.(254)

20. Though this argument appears plausible enough, it will lose its force, when we come to consider, that the 7th article speaks only of goods be-

(253) "Tous navires que se trouveront chargés d'effets appartenans à nos enemis, et les marchandises de nos sujets ou allies qui se trouveront dans un navire enemi, seront pareillement de bonne prise." Art. 7, tit. *des Prises.*

(254) "Pour se convaincre de la verité de cette proposition, il n'y a qu'à se rappeler la seconde partie de l'article 7 ci-dessus, qui declara de bonne prise et sujettes à confiscation toutes les merchandises trouvées dans un navire enemi, à qui que ce soit que celles appartiennent, aux sujets du roi, aux allies, comme à tous autres. Or, si les sujets du roi ne sont pas recevables à reclamer les effets qui leur appartiennent dans un navire enemi pris même par un Francais comment le seraient ils, la prise étant faite par un étranger, allie, ou neutre, sur son enemi ? Si donc les effets des sujets du roi doivent leur être rendus, lorsque la prise est forcée de gagner un porte du royaume, soit pour éviter la reprise, soit par tempête ou autrement, il est evident que ce ne peut être qu'à titre de récompense ou de rétribution pour l'asile donné, puisque hors de cas il ne peut y avoir lieu à la reclamation." Valin, *Com.* p. 274.

True reasons of the regulation of the French ordinance.

longing to subjects or allies, and not of those belonging to neutrals, as Valin erroneously imagines. This being admitted, it is easy to discover that the reason of this regulation is wholly founded in justice, equity, and the laws of good government, which ought not to allow a subject or ally to maintain, in time of war, a close correspondence with the subjects of an enemy, and to aid their commerce in contraband goods. This reason, deduced from a regard to public safety, is not applicable to a nation in a state of perfect neutrality; and it would be palpably unjust to confiscate the goods of its subjects found on board of an enemy's ship. Whatever extension we may be disposed to give to the rights of war, they can never justify a violation of the natural rights of a neutral and pacific state, which, without interfering in the quarrels of others, endeavours, by lawful means, and in obedience to the law of nature, to secure its own preservation and prosperity;(255) since it is a princi-

(255) *In hâc tamen quæstione pro interpretatione tam juris civilis quàm dictæ dispositionis consulatus, (cap. 273) distinguendum videtur. Aut merces quæ inveniuntur super navi inimicâ depredatâ spectant ad omnes subditos, vel vasallos, aut confederatos cum ipso principe vel rege, sub cujus vexillis navigabat altera navis quæ dictam navim hostilis rationis deprædavit, et tunc merces quoque cadunt sub præda, quemadmodum ipsa navis hostilis, quia qui communicant cum inimicis nostris, ipsi quoque inimici nostri fiunt: est enim prohibitum habere commercium cum inimicis. Aut vero merces spectant ad alios amicos qui non sunt subditi, neque vassalli, aut confœderati, sed neutrales utriusque nationis, et tunc prædictæ merces non rite et recte possunt deprædari, quia eis non est prohibitum contrahere cum inimicis alicujus principis vel regis, prout prohibitum est vasallis et subditis, ac aliis jure pacis aut aliâ lege confœderatis: et in toto isto*

We are not responsible for the natural consequences of a lawful act.

ple of universal jurisprudence, that whoever makes use of his own legal right, is never responsible for the consequences, which naturally result from the exercise of it.(256)

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secundo casu benè procedit dispositio tam juris civilis quam consulatus ablate tradita, etc. Casaregis, *de Commercio*, disc. 24, n. 21. See Roccus, *de Offic. Prefect. Class.* § 2, *de præd. bonor.* n. 28, 29, 30, 31. Hubner, tom. 1, ch. 4, § 5.

(256) The following decisions of some maritime courts perfectly coincide with the principles which I have here advanced. In the cause of Christopher Morello and others against the English privateer *Charles Wardelake*, the consulate of Nice, by its decree of the 21st February, 1760, in favour of the claimants, subjects of his Sardinian majesty, ordered 40 bales of hemp, and two hampers of vermicelli, captured on board of a French vessel by the English privateer, and carried into the port of Ville-franche, to be restored to the owners. The same court, in the month of May in the same year, pronounced a similar decree, in favour of S. Gilli and R. Imbert, of Nice, against the same English privateer, and ordered 14 bales of hemp belonging to the first, and two belonging to the second, captured on board a French vessel carried into Ville-franche, to be restored to them. By a decree of the Supreme Royal Council of Sardinia, of the 27th January, 1786, on the authority of another sentence of the captain-general of Cagliari, the 23d July, 1779, a cargo of oil taken on board of a French tartan, and carried into Cagliari, was ordered to be restored to the claimants, owners of the goods, in that city.

ARTICLE IV.

Of Prize Courts.

§ 1. ACCORDING to the principles above established, and the uniform practice of maritime powers in time of war, there can be no doubt that every belligerent nation has a right to institute prize-courts within its own territory, for the purpose of deciding on the validity of captures made by its armed cruisers, and brought into their ports, or into a neutral port.* These courts are extraordinary tribunals, proceeding from special authority, and established to decide between natives and foreigners, according

* If it be meant that a court in the belligerent country may adjudicate on a prize while lying in a neutral port, the doctrine may well be questioned. Whatever may have been the practice of certain nations at particular times, it appears to be a well established principle, that a belligerent nation cannot institute a prize-court in a neutral country. Lampredi, § xiv, cited ante, p. 255. 1 Robinson, *Adm. Rep.* p. 135. *Flad Oyen.* Brown's *Civil and Admiralty Law*, Vol. II, p. 255. Dallas's *Reports*, Vol. III, p. 6—16, *Glass v.* sloop *Betsey.* Nor can the courts of a neutral country decide on the question of prize as between the belligerents. From the same general principles on which these decisions have proceeded, it seems necessarily to follow, that the court of the belligerent captor cannot adjudicate concerning a prize lying in a neutral port. Besides, the proceedings in a court of admiralty are *in rem*, (Dallas, Vol. III, p. 86 and 101,) and the actual possession of the prize, or its being within the territory of the captor or his ally, seems essential to the exercise of jurisdiction over the subject. The High Court of Admiralty in Great Britain have refused to condemn a vessel lying in a neutral port. *The Herstelder*, Rob. Adm. Vol. I, p. 119, in note. And see Dallas, Vol. III, p. 121—132....T.

Privateering is a delegation of the right of war.

to treaties or the maritime law. So that we every where see, that questions of prize are under the regulation, and subject to the immediate action of the government, either for the sake of giving direction to the naval forces, or the better to regulate their conduct, or to modify its effects.

2. Privateering is a mere delegation of the right of war from a government to individuals, who devote themselves to such perilous enterprises. Privateers, thus constitute a part of the armed force, and serve as auxiliaries to their country. Captures being acts of hostility, or authorised conquests from an open or disguised enemy, are no more cognisable by the ordinary tribunals, than conquests by land. Privateers are, therefore, subject to distinct laws, and to a particular jurisdiction, independent of the ordinary civil and distributive justice of the country.(257)

3. In Spain, by the second article of the ordinance,

(257) "Privateering," says M. Bonnemant, in his note on D'Habreu, Vol. II, p. 152, "being a delegation of the national right, those who exercise this delegated power, can act only on the terms and agreeable to the rules prescribed to them, and must be judged according to those rules and principles on which the welfare of the state depends. It is because, the interest of the owners of privateers is subordinate to the national interest, that prizes are regarded as a kind of political property, which cannot be assimilated to the ordinary civil property, and that the adjudication of them can only be made effectual according to the proof of the facts on which its legality depends. Such is the ground for the intervention of the public authority."

relative to privateering,* the legality of captures is determined by the intendants, or their sub-delegates, residing in the ports where the prizes are carried; and in case there is no intendant or sub-delegate in the port, the cause is decided by the intendant of the province. In 1675, a violent controversy arose in Spain, between the supreme council of war, and that of Arragon, as to what causes belonged to the exclusive cognisance of each. After many petitions and representations, on one side and the other, the queen-regent, mother of Charles II, with the advice of the assembly of the states-general of the kingdom, decided the important dispute, by a declaration, published during the same year, in the following terms: "The council of war has the exclusive cognisance of all disputes relating to war, as the sending of dispatches, questions relative to salutes and to prizes, which must be determined according to the military laws." This system of judicature is still maintained in Spain. There is another royal ordinance dated the 14th June, 1797, relative to the competency of the tribunals, and containing some regulations as to captures, the 7th article of which is as follows: "If a neutral vessel be carried into my ports, and have on board Spanish property, whenever the value of such property shall be equal to half the value of the cargo, the prize shall be determined by my courts; but if the value of the effects do not

* *Corso, la course,* is, literally, cruising, which may be either by a public or private armed ship....T.

amount to half the value of the cargo, the prize shall be decided by the court of the captor." This article, during the last war with France, gave rise to some difficulties which were removed by the ministers of the two powers; but France has never relinquished the right claimed in her conventions with the court of Madrid. There is another step to be taken in Spain, in relation to vessels belonging to the emperor of Germany. By the 30th article of the treaty of 1725, between the two courts, the king of Spain consents, that appeals from the decisions of the Spanish courts, interposed by the subjects of his imperial majesty, should be carried before the council of commerce of Madrid, to the exclusion of every other tribunal.

4. In Denmark, maritime affairs are made cognisable by the admiralty, and, consequently, all maritime captures are decided upon by that tribunal; but in case of complaint, the decisions of the admiralty court are removed by appeal to the king's council, agreeably to the 38th article of the treaty of 1742, between that kingdom and France. The provision contained in this article has been inserted in all subsequent treaties with other powers.

5. In the war, between Russia and the Ottoman Porte, the former, by an ordinance of the 31st December, 1787, established, in the 16th article, the following regulation for the adjudication of prizes:

"Whenever a prize is brought in, the Russian minister, after being informed of it, shall examine all the papers and documents found on board, and shall then interrogate the master, and some of the mariners, and reduce their answers to writing. When these answers are found to agree with the documents, and no doubt remains that the ship and cargo are the property of an enemy, a decree in form shall be pronounced, a copy of which shall be delivered to the owner of the privateer, and another copy to the master of the captured vessel. Pursuant to this sentence, the owner of the privateer may proceed to sell the prize and the cargo for his own benefit." The 23d article is, as follows: "As soon as the imperial Russian fleet shall arrive in the Mediterranean, the commander in chief, shall institute a commission to decide on all matters of prize. All masters of privateers are, therefore, commanded to make report to him, without delay, of all vessels and goods captured by them." In the 24th article it is provided, that "if before the arrival of the fleet in the Mediterranean, either party shall be dissatisfied with the decision of the minister as to the prize, or, afterwards, by that of the commander in chief of the fleet, he may appeal to the imperial court of Russia."

6. In England, questions relative to maritime capture are brought directly before the courts of admiralty. Appeals lie to the king in council, and not to the court of king's bench, or the supreme court of of common law. Thus it is always the executive

power, which pronounces the definitive sentence in matters of prize.*

7. In Sardinia, all the proceedings relative to maritime captures, are determined, in the last resort, by the court of the captain-general, established at Cagliari; but the parties may procure a revision of its decrees, before the supreme council, attached to the king, by the ordinance of the 30th August, 1770.

8. In the kingdom of Naples, maritime captures are brought before the court of admiralty, established by a royal edict of the 6th December, 1783, which abolished the ancient court of the high admiral.

9. Prize-causes are decided at Trieste by the tribunal of commerce; at Ancona and Civita-Vecchia by the governor of the place; at Leghorn by the civil auditor, with the aid of the governor of the city; at Genoa, by the tribunal of commerce; but parties may have the decisions of all these courts reviewed by their respective governments.

10. In France, before the revolution, the power of deciding prize-causes, was vested, the 20th December, 1739, in a council composed of ten counsellors of state, six masters of requests, with an admiral for the president. From this court an appeal lay to the king in council, who never decided but from reasons of state. Public and secret treaties

* See Vol. I. p. 400, 401, note....T.

were consulted, and neutrals were never made the victims of legal subtilties. By the laws of the 14th February and 1st October, 1793, and afterwards, by the erroneous interpretation of the constitution of the *third* year, which gave to the civil tribunals the decision of prize-causes, France departed, for a time, from the principles flowing from the primitive and conventional law of Europe. But the law of the 18th March, 1800, by which a council of prizes, at the seat of government, was wisely established, has brought things back to the original state, in which they ought always to have remained.

11. This council, which decides, in the last resort, all matters relating to prizes, is composed of a president, who is a counsellor of state, and eight other members, a secretary, and two door-keepers. Five members at least are requisite to pronounce a decision. This council forms no part of the ordinary judicature; it is a political institution, established by a special commission from the government, to decide in an executive capacity,* on the validity of maritime captures. It is a court of equity, a distinct body formed to decide between the inhabitants of France and foreigners, according to the law of nations, and the diplomatic relations existing with foreign states, and not according to the strict forms of the common law. Its powers, therefore, are not limited or restrained by points of practice, or legal formalities,

* *Pour decider d'une maniere administrative.*

though it may decide upon them. Causes are not brought to a hearing, as they are before the ordinary tribunals. Simple memoirs, communicated by the respective parties, or their advocates, by means of the secretary of the council, and which must contain the proofs of their rights and powers, are considered sufficient: No publicity, no detailed opinions, but simple decisions. The delay in bringing a cause to a hearing cannot exceed three months, where the prize has been brought into the ports of the Mediterranean, or two months, if into any other ports of France. The time is reckoned from the day the papers are delivered at the secretary's office. The opinions of the commissary of the government must be stated in writing.

12. The decisions of this council are executed at the instance of the parties interested, but with the concurrence and presence, 1st, of the officer of the administration of the marine; 2d, of the chief inspector of the customs; 3d, of the authorised agent of the crews of the capturing vessels. All provisions contrary to this act, regulating the proceedings in matters of prize, are of no effect.

13. According to this law, there is no obtaining a petition, or writ of review, to be relieved against the decisions of the council, for that is an extraordinary mode of proceeding reserved, under certain circumstances, for cases purely civil, and which can be used only in the ordinary tribunals, according to the forms

rigorously prescribed by the ordinance of 1667.* Yet a review by the council of prizes takes place, whenever it is shewn, that its decision has been founded on false papers, or on a translation, discovered, afterwards to be incorrect. It was so decided by the council, the 15th March, 1801, in the case of the Danish ship *Wilhemsburgh, Boysen*, master, against which the council, on the 11th November preceding, had pronounced a decree of confiscation. It may be useful to cite some passages from the excellent opinion delivered in that case, by M. Dufaut, the commissary of government: "If, however, the council," he observes, "have rendered a judgment which has been obtained "by surprise, or fraud, it ought to have the power of "retracting it. The power of correcting its errors "is a right of which the judge, and the executive "who have been deceived ought to be jealous. If a "decision be the result of deception and error, the law "has given the means of reviewing it: these are esta-"blished in the ordinance of 1667. If an execu-"tive body make a decree founded on false do-"cuments, the law further intends it shall have the "power itself of taking back that decision. The "forms of tribunals, and of executive bodies, differ, "but their object is the same; it is the correction "of an error committed by them. The council of "prizes, being an executive institution, may, then, "modify or revise its decisions; the interest of "the public, as well as that of individuals, demands

* See Domat's Civil Law, tome 2, liv. 4, tit. 9. Pothier, *de Procédure Civile*, part. 3, sect. 3, *des requêtes civiles*....T.

The council of prizes at Paris, may review its decisions.

"it. If this power be taken away from the council, "how can it conciliate the interest of those powers "whom your decrees have offended, and of which "they have a right to complain? The government, "in giving to the council the power of deciding in "the last resort, did not intend to deprive parties of "the means of procuring a revision of its decisions, "whenever they were the result of surprise. If the "documents that have served as the basis of a de- "cision, are discovered to be false, nothing should "prevent the re-examination of that decision. The "council, as an executive commission, may use "the means which are used by executive bodies, "every day. If in the case of the *Wilhemsburgh*, the "documents, on which your decision was founded, "are false, the council ought to revise its decree. "For these reasons, I conclude, &c." The council, after hearing the report of *M. Collet Descotils*, &c. &c. decided according to the above opinion.

14. Privateering being, as has been already observed, a delegation of the right of war vested in the supreme authority of the state, the latter, consequently, is, always, a judge of the manner in which the commander of the privateer has executed his commission. For this reason, agreements entered into by him, are not to be executed, until they are sanctioned by the council, and have received its seal. This is different from other agreements between individuals concerning objects purely civil, in which the sovereign authority has no right to interfere, since the parties are free to decide on the terms of their

French privateers are forbidden to ransom their prizes.

engagements, and to make what sacrifices they please. But, as on the one hand, the proceeds of captures do not go to the captor, except as an encouragement and reward for the service he has rendered to the state, and on the other, as his interest is always subordinate to the interest of the public, he cannot bind himself by a special agreement contrary to the public interest. Such was the decision of the 3d June, 1800, agreeably to the ancient order of the king's council, of the 7th December, 1675, and the letter of the high admiral of France, of the 25th December, 1757, cited by Valin in his commentary on the marine ordinance of 1681.

15. For this reason, the king thought it his duty to prevent the abuses which resulted to the state from the ransoms demanded by privateers and armed cruisers, in the cases authorised by the laws of France. They were restrained to certain circumstances, by a decree of the council, the 11th October, 1780; and by the first article of the ordinance, of the 30th August, 1782, they were entirely prohibited.(258)*

(278) See *post*, article *Ransom, &c.*

* By the laws of the United States of America, the district courts, one of which is established in each state, have original and exclusive cognisance of all civil causes of admiralty and maritime jurisdiction. From the final decrees of a district court, where the sum or matter in dispute exceeds the value of three hundred dollars, an appeal is allowed to the next circuit court held in the same district. A final decree of a circuit court, when the matter in dispute exceeds the sum or value of two thousand dollars, may be re-exa-

Of recaptures in various ways.

ARTICLE V.

Of Recaptures.

§ 1. A CAPTURED vessel may be restored, and return again into the possession of her original owner, in several ways: by the generosity of the captor who releases her, though a lawful prize; by a recapture,(259) effected by the address or force of the crew of the vessel, or by a third person; or by a ransom of the ship or cargo, made by the captain, or any other person, paying a certain sum for her release, in order to avoid any adjudication on the legality of the capture.

2. Whenever the crew of a captured vessel, seizing a favorable occasion, rise, and succeed in re-

mined by a writ of error before the supreme court of the United States, which is the court of the last resort. The judicial power of the United States, according to the constitution, is vested in these courts which are altogether independent of any influence or controul of the executive power, and in all matters of prize, proceed according to the established laws and usages of the nations of Europe. Laws of the U. S. Vol. I, p. 47, &c. See also *Journals of Congress*, 1781, Vol. VII, p. 68, 189, Folwell's edition. Dallas's Reports, Vol. III, p. 6—16, *Glass v.* sloop *Betsey*. Cranch's Reports, Vol. I, p. 10, and the note, *Talbot v. Seaman*. See also, I. Dallas, 44, 49, 180, 218, II. Dallas, 1, 19, 94, 26, 81, 160. III. Dallas, 32, 54, 86, 101, 133, 188, 285, 333, 336....T.

(259) *Recousse*, *recapture*, is a prize retaken from an enemy. In Spanish it is called *recobro*; in Dutch, *henoomen-schepen*; in German, *wiedereroberung* or *wiedernehmung*; in Italian, *ricupero*.

taking her, the property returns to the original owners respectively, and the captor will have no right to reclaim the prize, which he was unable to keep; since the only means, according to the principles of universal reason, of preserving his right is to maintain his possession.(260) It does not follow, however, that the crew have right to appropriate to themselves the property rescued; because, it is as much their duty to retake the vessel whenever it is in their power, as it is to preserve and defend it; yet it is just, that they should receive a reward, proportioned to the nature of the case, the value of the cargo, and to the circumstances of the rescue.(261)

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(260) Vattel, *Droit des Gens*, liv. 3, § 213 et 228. Valin, *des Prises*, ch. 6, § 1, n. 18, and his *Commentary* on the *Ord. de la Marine de France*, art. 8, tit. *des Prises*. Dig. lib. 41, tit. 1. L. 3, § 2, *de adquir. rer. dom.*—*Quidquid eorum cæperimus, eo usque nostrum esse intelligimus, donec nostrâ custodia coërceretur. Cum verò evaserit custodiam nostram, et in naturalem libertatem se receperit, nostrum esse desinit, et rursùm occupantis fit.*

(261) *Consolato del Mare*, cap. 287. Targa, *Pond. maritime*, ch. 46, n. 10. Emerigon, *Traité des Assurances*, ch. 12, sect. 24 & 25. In the 26th section of this treatise, page 505, a fact is related which it may be proper to mention in this place:—"The pink *Sainte Anne*, captain *P. Arnaud*, on her voyage from Damietta, was captured by an English privateer, who sent her to Leghorn, under the command of an officer and twelve seamen. Six days after, the prisoners on board, eluding the vigilance of their conquerors, seized on the vessel, and carried her into Ajaccio in the Island of Corsica, and from thence to Marseilles. They asserted, that as this was a recapture made after twenty-four hours, they were entitled to the whole property, pursuant to the 8th article of the ordinance relative to prizes. The owners and assurers, for

Recaptures from privateers and ships of war.

3. In regard to the recapture of vessels, it is necessary to distinguish the case of a capture made by pirates or sea-robbers, from that made by open enemies, or authorised privateers. In the first case, there can be no doubt, if the vessel captured has escaped from the captor, or has even been rescued by the aid of third persons, that it ought to be restored to the owner; for as pirates have no lawful right to make prizes, the property has not been divested from the owner; and the recovery ought to be considered the same as that of goods which have been stolen, whenever the above circumstances concur, as will be seen when we come to speak of *pirates*. But when a privateer, under the sanction of the right of war, and clothed with the public authority, gains possession of a vessel and cargo, by a title acknowledged to be lawful, the property ought to be adjudged to the captor, in exclusion of the first

whom I wrote, answered, 1. That the 8th article of the Ordinance, title *des Prises*, speaks only of the ship that makes the recapture, and not of the prisoners who recover their liberty; 2. That this was more analogous to the case of the 9th article, where mention is made of a ship taken by enemies, and which returns, by some accident, into the possession of the king's subjects; 3. That the French crew, being on wages, were bound from their situation to preserve the vessel, and, consequently, to retake her whenever it was practicable; 4. That they acted for their own benefit, since they had recovered their liberty, their clothes, goods and wages. The sentence of the court, the 8th January, 1748, without deciding on the claim of the crew of the pink *Le Sainte Anne*, adjudged, however, 300 livres, as a reward to captain Arnaud, 130 livres to the pilot, 115 to the purser, and 100 to each sailor, besides their wages.

owner. A recapture entirely changes the face of things; for it is considered as a capture from the last possessor, and the last captor acquires the right of property in the effects retaken.(262)

4. The laws of each state, as well as treaties, may make a different disposition of prizes, either to avoid controversies, or for the sake of encouraging armed cruisers to recapture merchant-vessels taken by the enemy. It appears necessary, therefore, to give a succinct account of the regulations made on this subject, by the laws, and treaties of maritime nations.

5. The ordinance of France, of the 15th June, 1779, declares, that vessels recaptured from privateers lawfully armed, after having been twenty-four hours in their possession, shall wholly belong to the recaptors; but if the recapture has been made within twenty-four hours after the capture, the recaptors shall be entitled to no more than a third of the vessel and cargo. As to recaptures made by the king's ships, the same ordinance directs the proceeds to go to the royal treasury; the government undertaking to confer a reward on those who have assisted in the recapture. But by an ordinance of August following, addressed to the chambers of commerce, the

(262) Grotius, *de jure belli ac pacis*, lib. 3, cap. 16, with the commentaries of Gronovius and Cocceius. Marquardus, *de jure mercat.* lib. 2, cap. 4, n. 30, et cap. 5, n. 75. Vattel, *Droit des Gens*, liv. 3, ch. 13, § 196. D'Habreu, *sobre las presas*, part. 2. Cleirac, *Jurisdiction de la marine*, art. 34, p. 452.

Recaptures of things belonging to the sovereign.

king declared, that he gave up the prizes to the owners of the privateers who should make legal proof of their property. The same thing is done in Holland, England, and Sweden. This is agreeable to those maxims of equity which every sovereign ought to consider it his glory to observe, for the happiness of his people.(263) Thus, for the same reason, and in consequence of the mutual relations which connect the sovereign with his subjects, and the subjects with the sovereign, if a privateer has recaptured from an enemy, a vessel or any other thing belonging to his sovereign, he ought to restore it to its former master, on condition of being indemnified for the damages and expences he has incurred, and receiving a recompence proportioned to the service performed.(264)

6. In order to render a recapture lawful, the first taking must be of such a nature as to be declared valid; for if the first captor has violated the laws of war, the possession of the thing for twenty-four hours, will not give him the right of property, and

(263) Grotius, lib. 3, cap. 9. Puffendorf, lib. 8, cap. 6, § 22. Bynkershoek, *Illust. Quæst.* lib. 1, cap. 10, & lib. 3, cap. 6. Vattel, *Droit des Gens*, liv. 3, ch. 14, § 207. Valin, *des Prises*, ch. 5, n. 8.

(264) Loccenius, *de jure maritimo*, lib. 2, cap. 4, n. 3. Targa, *Ponder. Marit.* cap. 46, n. 5. Emerigon, *Traité des Assurances*, ch. 12, sect. 23, § 9.

consequently, the recaptor could claim no more than the right of rescue before mentioned.(265)

7. A ship that has been abandoned by the captors, from stress of weather, or any other circumstance of inevitable necessity, and before being conducted into some port of the enemy, though she has been more than twenty-four hours in their possession, ought to be restored to the original owner, or to the assurers, provided they put in their claim, within a year and a day.(266)

8. Valin, in his commentary on the 9th article of

(265) Ordinance of France, art. 10, tit. *des Prises*, and the commentary of Valin. Emerigon, *des Assurances*, chap. 12, sect. 23, § 7, relates a fact not inapplicable to the present subject: "On the 23d April, 1757, the barque *Victory*, captain Fouquart, pursued by a British cruiser, took refuge under the castle of the Island of Majorca, where she anchored at the distance of pistol-shot from the castle. The British cruiser sent an armed boat, and brought off the barque, in spite of three shot fired at her from the castle. Some days after, the barque was recaptured by captain Michel. Messrs. Roangen and Dangalliere, to whom she belonged, claimed her. They said, that by the law of nations, each sovereign had the dominion of the seas adjacent to his territories ..... When the *Victory* took refuge under the cannon of the fort of Majorca, the English cruiser had no right to take her. In doing so, he acted piratically. The capture was unlawful, and a nullity. And they cited the 10th article of the ordinance, title *des Prises*, as in point. The council of prizes, by their decree in December, 1757, adjudged one third of the value of vessel and cargo to captain *Michel, for the recapture*. The remaining two-thirds was restored to the owners and insurers."

(266) *Guidon de la Mer*, ch. 11. *Ordinance de France*, art. 9, tit. *des Prises*. Emerigon, *des Assurances*, chap. 12, sect. 24.

the ordinance of France,(267) compares this case to that of a shipwreck, and supports the comparison, by the directions of the 27th article of the ordinance, title *(des naufrages)* shipwreck. He maintains, therefore, that the person who has brought in the vessel abandoned by the captor, and restored her to the owners, is entitled to one-third of her value.

9. It is easy to prove, that Valin is mistaken; for the ordinance itself is against his asserstion. The 9th article, directs the vessel so recovered to be restored to the owner.(268) It is by the 27th article, that the third of the value of the goods shipwrecked and found on the high sea, or drawn up from the bottom after being sunk, are adjudged to the salvors. The case of a vessel abandoned by her crew from necessity, can never be compared to that of shipwrecked goods, found on the high sea. The owner of goods scattered or sunk by shipwreck, has no longer any hope of recovering them, whereas, a vessel abandoned from fear, may, by a thousand chances, be restored, safe and sound, to the original owner. Besides, the 27th article treats wholly of shipwrecked goods, and says nothing of vessels abandoned on the high

(267) Valin, tom. 2, p. 260, 261.

(268) Art. 9, tit. *des Prises.* "If a vessel, without being recaptured, is abandoned by the enemy, either by reason of tempest, or any other fortuitous event, comes again into the possession of our subjects, before she has been carried into a port of the enemy, she shall be restored to the owner, who makes his claim within a year and a day, though she may have been more than 24 hours in the hands of the enemy."

Claim of a person for bringing in a vessel abandoned by the captor.

sea. There is, therefore, no analogy between the two cases. The ordinance gives a third only in the case of a vessel taken by an enemy, and recaptured by another vessel. The only object of this regulation is to reward the generous courage of those, who, for the sake of delivering a captured vessel, expose themselves to the danger of falling into the hands of the enemy. But in a different case, and without such an object, to adjudge a third, which is the consequence and effect of that object, would be inconsistent with justice and equity. In fact, he who restores to the original owner a vessel found abandoned on the high sea, has certainly done much less than he who exposes his life and property to rescue a captured vessel from the hands of an enemy. He ought, therefore, to receive a less reward. It is true, that a ship so abandoned to the mercy of the waves, may be wrecked, or fall into the hands of corsairs or pirates; but on that supposition, it is only saved from a possible danger, whereas, by recapturing it from an enemy, it is rescued from real danger, and a certain loss. The recompence in the first case, ought, therefore, to be less than in the second, though proportioned to the nature and extent of the service performed, yet always less than a third of the value of the articles recovered.(269)*

(269) *Consolato del Mare*, cap. 287. *Guidon de la Mer*, ch. 11. Targa, *Pond. Marit.* ch. 46, n. 10. Casaregis, *de Commercio*, disc. 24, n. 3.—Loccenius, *de jure maritimo*, lib. 2, cap. 4, § 3.

* Where a *prize* has been *abandoned* by the captor, from *necessity*, or *voluntarily*, and it is taken up by a friend or fellow country-

Case of a vessel abandoned by the captors.

10. The convention relative to recaptures, concluded the 1st May, 1781, between France and Hol-

man of the owner; or where it is conducted into port by some of the crew left on board, M. Martens is of opinion, that in the last case there can be no doubt that the crew ought to restore it to the owner, as in case of a rescue. In the other, if the enemy abandon his prize after he has acquired a full property in it, it is then strictly *res nullius*, and becomes the property of the first occupant. But as this case can scarcely happen, he thinks it reasonable that the property should be restored to the first owner. *Essay on privateers, captures, and recaptures*, § 54, p. 144. A remarkable case of this kind came before the courts of the United States in 1794. The *Mary Ford*, with her cargo, belonging to *British subjects*, was captured by a ship of war belonging to a *French* squadron; the captain and crew, with the ship's papers, were taken out and put on board of the enemy's ship, and a French officer, with some men, took possession of the prize, which they kept for more than 24 hours: afterwards, the commander of the squadron ordered the prize to be burnt, which was attempted without success. She was then abandoned, and was afterwards taken possession of by an *American* ship, and brought safely into Boston. The owners and crew of the *American* vessel filed their libel in the district court of Massachusetts, and the *British* consul, in behalf of the original owners, put in a claim, and demanded a restoration on payment of salvage. The *French* consul also, in behalf of the French republic, filed his claim to the vessel and cargo, as the property of the captors, by the laws of nations. The district judge considered the vessel and cargo as derelict on the high sea, and the property having been sold by consent of parties, he ordered one third of the nett proceeds to be paid to the owners and crew of the American vessel for salvage, and the residue to remain in court to the use of the *British* claimants who might prove their right. The circuit court, on an appeal, reversed this decree as to the *two thirds* which were ordered to be paid to the *French* claimants. The court considered the property as having been vested in the captors by right of war; that the abandonment under the circumstances, did

land, declares, that if the recapture has been made by a privateer, before the prize has been twenty-four hours in the possession of the enemy, it shall be restored to the owners, on their paying to the recaptors, one third of the value of vessel and cargo; but if the recapture was made after the vessel has been twenty-four hours in the hands of the enemy, the whole shall belong to the captors. If the prize has been recaptured by a public armed ship, it shall be restored to the owner, on his paying one third of the value, if the recapture was before, or one tenth, if it was made after twenty-four hours possession by the enemy.(270) The 24th article of the treaty of commerce, made in 1786, between Great-Britain and

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not revive the right of the original owners: and that the right of the captors would continue until divested by a recapture. From this decree the British consul appealed to the supreme court of the United States, where the decision of the circuit court was affirmed. The court said, that by the capture, the captors acquired such a right as no *neutral nation* could justly impugn or destroy. Some doubts were entertained whether the whole property, being abandoned by the captors, ought not to have been adjudged to the *American* libellants, or at least a greater portion for salvage, but as that part of the decision of the district court was not appealed from, it was not considered. *Dallas's Reports*, Vol. III, p. 188, 198. According to the reasoning of M. Martens, Azuni, &c. the *American* vessel would not have been entitled to the whole property, and the district judge was correct in ordering a restitution, on payment of salvage....T.

(270) Martens, *Collection of Treaties*, Vol. II, p. 127.

France, contains exactly the same rules as to the restoration of vessels recaptured.(271)

11. Though there is no express convention between France and Spain, on the subject of recaptures, it appears, that, as long as the family compact between the two powers existed, their respective subjects might demand the restoration of vessels recaptured, on the same terms as was practised in relation to the subjects of each; since according to the tenor of that compact, every war, in which one nation engaged, became common to the other, on condition of a mutual compensation of advantage and loss, and of securing the same treatment to the individuals of both nations.(272) So that, during the American war, many Spanish ships, captured by the English and recaptured by the French, were restored; as the *San Joseph*, retaken by the king's frigate *Montreal*, and restored by an order of the council, the 17th December, 1780; the *Notre-dame-des-Carmes*, recaptured by the king's cutters *Malin* and *Lésard*, restored by an order of the council, the 2d December, 1781; the *Saint Francis*, recaptured by the king's frigate *la Bordeuse*, restored by an order of the council, the 10th March, 1782. The case was different in regard to recaptures made by privateers to whom some recompense, or rather some encouragement, was due from the state. On this principle, the council of

(271) Martens, *Collection of Treaties*, Vol. II, p. 680.

(272) Martens, *Collection of Treaties*, Vol. I, p. 1.

prizes, at Paris, the 9th February, 1801, decided, as to the Spanish vessels *Inesperado*, and *Santo Antonio y animas*, recaptured by the privateer *Eole*, of Bordeaux. On this occasion, the Spanish ambassador, relying on the generosity of the French, claimed the restoration of the vessels recaptured, on the ground of friendship and justice, though by a law of the king of Spain, of the 2d May, 1799, it was ordered, that the *vessels of allies recaptured, should belong to the recaptors*.—Among the reasons assigned by the council, in their decision of this case, the following are worthy of notice: "That if we stood in relation to Spain "on the footing of the law of nations, or of common "law, and the vessels now claimed had been cap- "tured by a national ship of war, the government "would generously sacrifice its interest, to the senti- "ments which attach it to that power, without even "regarding the laws of Spain in regard to recaptures; "but the particular laws of France, relative to re- "captures, do not permit the government to sacri- "fice the sacred right of property in a French citi- "zen, to an ally, and to discourage its brave seamen, "by taking from them the reward due to their ser- "vices, and their devotion to their country."

12. There is no particular convention, as to recaptures, between France and Portugal. The treaty of 1641, contains nothing on the subject; and that of 1713, establishes nothing new in that respect; (273) the 6th article only declares, that the same pri-

(273) Dumont, *Corps Diplomat.* tom. 6, part. 1, p. 214.

Case of a recapture of a Portuguese vessel by the French.

vileges and exemptions which the subjects of his most christian majesty enjoy in Portugal, shall be granted to the subjects of his Portuguese majesty in France. During the last American war, when Portugal was neuter, a ship of that nation, the *Nostra Senora d'Orallo*, captured by an English cruiser, and recaptured within twenty-four hours after, by the French privateer, *le prince de Tingry*, was restored, by a decree of the 29th December, 1781;(274) the French privateer was condemned to pay twenty thousand livres damages and costs, to the Portuguese owners, and the captors, also, were refused any salvage, on the ground, that the law of recapture did not apply, so as to allow salvage to French cruisers, for recapturing a neutral vessel, which it was to be presumed would not be condemned by the English. Besides, the vessel was captured and recaptured on the same day, and of course, within the twenty-four hours.

13. The preliminary treaty of commerce, between France and Sweden, in 1741,(275) explained by that of 1784,(276) merely grants to the subjects of the two powers a reciprocity as to duties, and with some further restrictions. The treaty of subsidy existing between the two powers, contains nothing applicable to recaptures. Sweden being neutral during the

(274) *Code des Prises*, tom, 2, p. 1021.

(275) Wenk, *Cod. jur. gent.* tom. 2, p. 5.

(276) Martens, *Collection of Treaties*, Vol. II. p. 526.

Case of a Swedish vessel recaptured by the French.

American war, a Swedish vessel, the *Mercury*, laden with hemp, captured by an English cruiser, and recaptured by a French cruiser, within twenty-four hours, was ordered to be restored by a decree of the council of prizes, the 14th April, 1779, confirmed by an order of the king's council, of the 27th December, 1779.(277) A similar decree was made relative to the Swedish ship *Argos*, laden with bar-iron, taken by an English cruiser, and recaptured nine days after, by the French privateer *Josephine*. The council of prizes, by a decree, pronounced the 13th June, 1781, released the vessel to the Swedish claimants, on their paying to the recaptors, by way of salvage, one third of the value of the prize, to be estimated by well-informed merchants. The Swedes appealed from this sentence, and the captors also appealed, alledging their right to the whole, either as lawful prize, or on the ground of a recapture. The king, by an order of the council of state, decreed, that there was no right of recapture, and condemned the captors to pay all damages, costs, and expences, on the same principles which governed the decision of the case of the *Mercury*.(278)

14. The treaty of 1662,(279) between France and Denmark, though very full on every other point relative to commerce in time of war, is silent as to recap-

(277) *Code des Prises*, tom. 2, p. 789.

(278) *Code des Prises*, tom. 2, p. 1044.

(279) Dumont, *Corps diplomat.* tom. 6, p. 436.

tures. The 34th article of the treaty of 1742, concluded for fifteen years,(280) and continued the 30th September, 1749, declares the restitution of effects recaptured from pirates, but it makes no mention of recaptures, properly so called.(281)

15. The treaty of commerce, between France and Russia, in 1787, makes no express mention of recaptures. It is, however, stipulated, in the 34th article of that treaty, that the subjects of the respective parties shall be treated in time of war in the same manner as their own subjects; from whence it would seem to follow, that they ought to restore to each other vessels recaptured, whenever they would be restored to their own subjects respectively.(282)

16. By the 16th article of the treaty of commerce between France and the United States of America, February 6, 1778,* it is agreed, that goods rescued from pirates shall be mutually restored to the owners, but nothing is said of recaptures in other cases. Neither the third article, which grants the same treatment as is shewn to the most favored nation, nor the 6th article, which affords protection to the vessels of the respective nations, can be extended so as to apply

(280) Wenk, *Cod. jur. gent.* tom. 2, p. 5.

(281) *Code des Prises*, tom. 1, p. 470.

(282) Martens, *Collection of Treaties*, Vol. III, p. 1.

* This treaty is no longer in force. See Laws of the United States, Vol. IV, p. 162....T.

to recaptures.(283) The treaty of alliance formed the same year, makes no direct mention of the subject.

17. The laws of Spain agree almost entirely with those of France, on the subject of recaptures made by privateers, of vessels belonging to Spanish subjects; so that if such lawful prize should be recaptured before she has been twenty-four hours in the possession of the enemy, she will be restored to the owner, on his paying one-third for salvage; if the vessel has been more than twenty-four hours in the hands of the enemy, she will belong wholly to the recaptors. An exception, however, is made in case the vessel be laden with contraband goods, or navigated solely for pleasure.(284) As to recaptures made by the king's ships, the ordinance of 1663 declares, that what belongs to persons known should be restored to them, provided, the enemy shall not have kept possession for twenty-four hours.(285) The 11th article of the ordinance of 1718 declares, that if a ship has been abandoned by the enemy, or if a tempest or any other accident should throw her into the hands of the king's subjects, before she has been carried into an enemy's port, she shall be restored to the original owner, though she may have been in the

(283) Martens, *Collection of Treaties*, Vol. 1, p, 685.

(284) Ordinance of 1621, and 1718, art. 10. Ordinance of 1779, art. 23.

(285) Ordin. for the Royal Fleet, ch. 397. Collect. Philip IV, part 2, p, 371.

the possession of the enemy more than twenty-four hours. But in regard to vessels retaken from pirates, we find in the Spanish laws, a regulation which, on principles of natural law, it is difficult to justify. It declares, that if pirates have been in possession of a vessel for twenty-four hours, it shall belong to the recaptors.(286) In relation to the rights of foreign powers, it is to be observed, that, whilst the ordinances of 1621, and 1718, speak only of recaptures of vessels belonging to subjects of the king of Spain, and the ordinance of 1633, concerning the royal fleet, vaguely directs, that effects belonging to persons known shall be restored, the ordinance of the 1st July, 1779, relative to privateering, art. 24, puts foreigners on the same footing with the subjects of the king, by declaring, that the vessels of neutrals or allies, captured by enemies, if recaptured within twenty-four hours after, shall be restored with their cargoes to the owners, on their paying one third for salvage.

18. Having spoken of those treaties between France and Spain, which contain any thing relative to recaptures, and intending to take notice of those

(286) Ordin. of 1621, art. 10. Declaration of 22d December, 1624. In the 7th and 12th articles of the Ordinance of 1618, there is an apparent contradiction on this point, which D'Habreu, in his treatise on prizes, attempts to reconcile; but the Ordinance of 1779, art. 9, leaves no doubt on the subject. See *post*, ch. v. art. 3, *of privateering, &c.*

between Spain and England, on the same subject, when I come to mention those treaties in their proper place, I shall here point out only the conventions made on this subject, between the court of Madrid and the other powers.

19. It was agreed between Spain and Holland, by the third article of the declaration of 1650, as to a treaty of marine, made the 25th November, 1676, that if a vessel was recaptured from an enemy by the ships of his majesty, or by privateers, or by those of their high mightinesses, or their subjects, in case the recapture should be made within 48 hours after the vessel had been in the hands of the enemy, the recaptors should receive one fifth of the vessel and cargo, for salvage; and if the recapture should be made within forty-eight hours after the first forty-eight hours, the recaptors should be entitled to a third of the vessel and cargo. But if the recapture was made after those periods, the recaptors should have one half.(287) The subsequent treaties made between these two powers, contain nothing relative to recaptures.

20. By the treaty of commerce of the 1st May, 1725, between Spain and Austria, it was agreed, that when a vessel belonging to the subjects of one power should be captured by a common enemy, and recaptured by a ship of war, or privateer, of the other power, if such recaptures should be made within

(287) Dumont, *Corps diplomat.* tom. 7, part. 1, p. 325.

24 hours after the vessel had fallen into the hands of the enemy, the recaptors should be entitled to a fifth part of the vessel and cargo; if the recapture should be made within twenty-four hours after the expiration of the first twenty-four hours, the recaptors should have a third; and if at any time after, one half; the residue was to be restored to the owners.(288)

21. The treaty of commerce, made the 19th March, 1641, between Spain and Denmark, says nothing concerning recaptures, though the 19th article seems to furnish an occasion for it. The 3d article merely stipulates, that the subjects of the two nations should be mutually treated, in regard to commerce, as natural born subjects,(289) which cannot be extended to the case of recaptures. The same silence on the subject of recaptures, is observed in the treaties with Portugal, though these two nations, by the 17th article of their treaty of the 6th February, 1715, engage to treat each other reciprocally on the footing of the most highly favored nations, among all who trade to the dominions of Spain and Portugal.(290)

22. Spain, by the 13th article of her treaty of commerce, made in 1782, with the Ottoman Porte, stipulated, that if a vessel of either party should be cap-

(288) Dumont. tom. 8, part. 2, p. 118.

(289) Dumont, tom. 6, part. 1, p. 210.

(290) Dumont, tom. 8, part. 1, p. 229.

tured by a common enemy, the other should unite his efforts in attempting a recapture, and in case of that event, the prize should be restored to the former owner.(291) The 11th article of the treaty with the regency of Tripoli, made in 1784, requires a restitution to be made to the owners, of all effects taken by pirates; and by the 13th article, effects taken by an enemy within cannon-shot of either state, are ordered to be restored.(292) The last point has been stipulated, in almost the same terms, in the 4th article of the treaty of 1786, with the dey and regency of Algiers; but neither of these treaties make any mention of recaptures, properly speaking.(293)

23. The 9th article of the treaty of amity, limits and navigation, of the 27th October, 1795, between Spain and the United States of America, declares, that effects rescued from pirates shall be restored to their owners; but there is no provision as to recaptures, properly so called, though considering the favour reciprocally shewn by the two powers towards each other throughout the whole treaty, it may be presumed, that in cases of recapture, they will adhere to the principles universally followed.(294)*

(291) Martens, *Collection of Treaties*, tom. 2, p. 229.

(292) Martens, *Collection of Treaties*, tom. 2, p. 531.

(293) Martens, tom. 2, p. 666.

(294) Laws of the U. S. Vol. II. p. 508. * See note, *post*...T.

Law of England relative to recaptures.

24. The first law which we can discover to have been passed in England relative to recaptures, is the act of 1692, which has served as the basis of several subsequent statutes: that act declares, that if any vessel belonging to the subjects of his majesty, after having been captured by an enemy, be recaptured, the vessel and cargo shall be restored, by order of the court of admiralty, to the first owners, on their paying, for salvage, if the recapture was made by a ship of war, one *eighth*, to be divided among the captains, officers, and mariners of such ship of war, agreeable to the act for the distribution of prizes; if the recapture has been made by a privateer or other private armed vessel, after the prize has been in the hands of the enemy twenty-four hours, one *eighth* shall be paid for salvage; if the vessel has been in the possession of the enemy more than twenty-four hours, and less than forty-eight hours, one *fifth*; if more than forty-eight, and less than ninety-six hours, then one *third*; and if more than ninety-six hours, then one *half*; such salvage to be paid without any deductions whatever. But if the vessel recaptured had been set forth as a vessel of war, then the recaptors shall be entitled to receive a *moiety* for salvage. These provisions have been re-enacted, word for word, in the acts of parliament in 1740, 1744, and 1756.(295)*

(295) Runnington, Vol. V, p. 379. Laws of the Admiralty, Vol. 1, p. 513.

* 13 George II, ch. 4, sect. 18. 17 Geo. II, ch. 34, sect. 20. 29 Geo. II, ch. 34, sect. 34. See Abbot, part 3, ch. 10, § 114....T.

Law of England relative to recaptures.

25. At the commencement of the American war, it was declared by an act of Parliament, in 1776, that if effects belonging to the subjects of his majesty, should be captured by any of his *rebellious* subjects in the colonies, and recaptured by any of his majesty's ships, or other vessel under his protection, they should be restored to the owner, on his paying one eighth for salvage. This provision, by an act in 1779, was extended to all vessels obtaining letters of marque from the king.(296) This change seems to have proceeded from the circumstance, that at the commencement of the war, the Americans were not considered as lawful enemies, and it was made for the purpose of applying to them the principle universally received as to recaptures from pirates.

26. When England became engaged, in 1778, in a war with France, and in 1780, with Spain and Holland, this provision was also applied to vessels belonging to his majesty's subjects, captured by those powers, and recaptured by his majesty's ships, or by privateers. Thus the act of 1779, repeats, *verbatim*, the fourth section of the act of 1776, but using the general expression, if any vessel *taken by our enemies* and recaptured, &c. It is further enacted, however, that if the recaptured vessel had been set forth to sea, by the enemy, as a vessel of war, then the recaptors were entitled to one *half*, as salvage. The act of 1780, further adds a particular clause, that if the vessels recaptured are of so little value, as not to be

(296) Runnington, Vol. XII, p. 436.

worth the expence and trouble of the admiralty proceedings, the two parties may make an amicable adjustment of their claims, provided an account thereof be given to the court of admiralty.(297)*

27. The particular relations subsisting betwee

(297) The English writers consider the act of 1740, as the form and basis of all the subsequent acts. Park, *on Insurance*, p. 72, 3d edit. Wesket, *Digest of the Law of Insurance*, V. *Capture.*

It is believed, that in the existing war a new act has been passed on this subject. The controversies which have arisen, sufficiently prove, that this act must be conformable to those of 1776 and 1783, as to the restoration of prizes.

* At the commencement of the last war, the parliament, by an act, 33 Geo. III, ch. 66, fixed the rate of salvage at *one-eighth* for the royal navy, aud *one-sixth* for private armed ships, but enacted that recaptured vessels, which had been set forth by the enemy as vessels of war, should belong wholly to the recaptors, and not be restored to the original owners. It was further provided, that if a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, with the consent of the recaptors, to prosecute her voyage, and the recaptors need not proceed to adjudication until *six months* after, or the return of the ship to the port from whence she sailed; and by consent of the recaptors, the cargo may be unloaded and disposed of before adjudication. If the vessel does not return directly to her port of departure, or the recaptors have had no opportunity to proceed to adjudication within the *six months*, on account of the absence of the vessel, the court of admiralty, at the instance of the recaptors, shall decree restitution to the former owners, on their paying salvage upon reasonable evidence; and the expence of the proceedings shall not exceed fourteen pounds. For the British law relative to salvage, see the excellent treatise of Mr. Abbot, *on the law relative to merchant-ships and seamen*, part 3, chap. 10, p. 320. See also, Brown's *Civil and Admiralty Law*, Vol. II, p. 266, ch. vii....T.

England and other powers, on this subject, are to be found in their conventions and public treaties. A special convention, on the subject of recaptures, was made with Holland, in 1689, at the time of their alliance, by which it was established, "that in case any vessel belonging to the king of Great-Britain, or the states-general, or their subjects, taken by the ships of war or privateers of an enemy, should be recaptured by the ships of war of his majesty, or of the states-general, or by a privateer duly commissioned by either of the two powers, before the prize had been carried *intra præsidia*, that is to say, into a port of the enemy, or fleet under its flag, such vessel, with her cargo, guns, and apparel, should be restored to the original owner, on paying salvage as follows; that is to say, if recaptured by a privateer, within forty-eight hours after the capture, one *fifth*; if within ninety-six hours thereafter, one *third*, and if after that time, one *half* of the value of the vessel, cargo, guns, and apparel; but in case of a recapture by a ship of war before the prize had been carried *intra præsidia*, one eighth of the value shall be paid for the salvage."(298)

28. This convention, concluded merely in reference to the then existing alliance, cannot be considered as binding at the present day. In 1748, the English ship *Lydia*, captured by a French privateer, was recaptured by a Dutch vessel and carried into

(298) Groot, *Placcar Boeck*, tom. 5, p. 395. Dumont, *Corps diplomat.* tom. 8, part 2, p. 301.

the Zuyderzee, she was claimed by the English. The states-general answered, that the vessel recaptured belonged, *jure belli*, to the recaptors, but that they were ready to restore her, if the English government would declare that it would do the same in similar cases, or would make a treaty to that effect, or renew the convention of 1689, then no longer binding. (299) I do not know the result of the negociation, but there is no doubt, that none of the conventions between the two powers, were renewed either by the treaty of 1784, or the treaty of alliance of 1788. (300) I should not suppose, after this, if any dispute should arise on this subject, that it would be decided by treaties anterior to that alliance, which, while it lasted, might produce the restoration of recaptured vessels in case of a common war.

29. Though there has been no express stipulation between England and Portugal, on the subject of recaptures, in the treaties of commerce, of 1641, and 1703, it appears, however, that some inferences may be drawn as to their intentions in regard to recaptures, from the treaty of alliance, of 1654, and from the treaty of perpetual alliance, of 1703, between England, the United Provinces, and Portugal. By the 4th article of the last treaty, the contracting powers

(299) See *Extract from the resolutions of the states-general*, 19th February, 1748. *Recueil* Van Zeezaken, tom. 6, page 45.

(300) Martens, *Collection of Treaties*, tom. 3, p. 127.

agree to maintain on the coasts of Portugal, a sufficient number of ships of war to protect the coasts of that kingdom, its merchant ships, and commerce; and the 5th article declares, that, in case any Portuguese cities, or possessions out of Europe, should be taken by enemies, the contracting parties should unite their efforts to regain the possession of them.(301) But all this implies a case in which Portugal would be a party in the war, and not a case of perfect neutrality. The 6th article of the treaty of the 26th September, 1793, concluded with a view to the existing war, declares, that in case France should attack the dominions of her most faithful majesty, her ships of war, or merchant vessels, the two powers should make it a common cause, and render each other every possible assistance, agreeably to existing treaties.(302) This seems to leave no doubt in regard to the restoration of vessels recaptured during an existing war, in the cases where they are restored to the subjects of the respective powers.*

(301) Dumont, *Corps diplomat.* tom. 6, part 2, p. 82, tom. 8, part 1, p. 127.

(302) Martens, *Collection of Treaties,* tom. 5, p. 210.

* In the case of the *Santa Cruz,* and several other Portuguese vessels, taken by the French, on the 1st August, 1798, and retaken by the English on the 28th, Sir William Scott, in the court of admiralty, decided that the law of England, in case of the recapture of the property of allies, was the *law of reciprocity;* that is, it adopts the rule of the country to which the claimant belongs. And it appearing that prior to the Royal Ordinance of Portugal, of May, 1797, it had been the practice of that country to consider Bri-

Of recaptures between England, Sweden, and Denmark.

30. In the treaties between Great-Britain and Sweden, we find nothing on the subject of recaptures; it does not appear that the general protection stipulated in the 16th article of the treaty of 1661, can be applied to the restitution of recaptured vessels. The treaties of alliance, in 1664, 1699, 1703, 1720, and 1727, are no longer in force. The treaty of alliance and commerce, in 1766, contains only, in the second article, a provision for being treated as the most favored nation, an expression too vague to be extended to cases of recapture.(303)

31. The 32d article of the treaty of alliance and commerce, made in 1670, between England and Denmark, declares, that if any vessel belonging to the subjects of either of the two powers, should be taken by an enemy, within the maritime jurisdiction of the other, the latter should unite in endeavouring to retake such vessel, and restore her to the owners, on their paying the expences of salvage.(304) The ex-

tish property recaptured from an enemy, after twenty-four hours possession, as good prize; the judge condemned two Portuguese vessels recaptured prior to that ordinance, but restored those taken since on paying salvage according to the law of Portugal in similar cases, that is, *one eighth* to ships of war, and *one fifth* to privateers. Robinson's *Admiralty Reports*, Vol. 1, p. 74, &c. This rule seems agreeable to the natural dictates of reason and justice, and its application will cut short those inquiries which have perplexed many writers on the various questions concerning recaptures....T.

(303) Martens, *Collection of Treaties*, tom. 4, p. 44.

(304) Dumont, *Corps diplomat.* tom. 7, part. 1, p. 132.

planatory convention, of the 4th July, 1780, contains nothing further on this point.(305)

32. The treaties between England and Russia, concluded in 1734, and 1766, are silent as to recaptures. They stipulate only for being treated, in general terms, as the most favored nation.(306) The convention of the 25th March, 1793, merely continued, for sixteen years, the treaty of 1766, with some slight alteration.(307) The convention entered into at the same time, in regard to the war, engages only for their mutual assistance, in terms too vague to admit of application to the subject of recaptures.(308)

33. England has made no express convention with Spain, in regard to recaptures. Neither the treaty of navigation and commerce, of 1713, which is an exact copy of that of 1667, nor the treaty of alliance, in 1793, make any direct mention of the subject. By the 2d, 3d, and 7th articles of the latter treaty, the two powers mutually engage to make a common cause, and to protect the vessels of their respective nations, and to aid each other when attacked, by sea or land: Thus, according to established principles, vessels recaptured after the execution of this treaty,

(305) Martens, *Collection of Treaties*, tom. 2, p. 102.

(306) Martens, *ibid.* tom. 1, p. 141.

(307) Martens, *ibid.* tom. 5, p. 108.

(308) Martens, *ibid.* tom. 5, p. 114.

ought, as long as the alliance shall continue, to be restored without any distinction between the subjects of either power, or those of its ally.

34. The treaty between Great-Britain and the king of the two Sicilies, made in 1713, merely confirms, in general terms, in regard to the two powers, the treaty of 1667, between England and Spain, and makes no mention of recaptures. The present war being common to Great-Britain and Naples, in consequence of the convention of the 14th July, 1793, and that of 1798, there is no doubt that the general principles on this subject would be applied to recaptures by either of the two powers, during the continuance of the war.

35. The 19th article of the treaty, made in 1678, between England and the Ottoman Porte, stipulates for the restoration of English property, recaptured from pirates, but is silent as to recaptures in general. Nothing can be found relative to recaptures in the treaties made by Great-Britain with the emperor of Morocco, in 1761, and 1783; with Algiers, in 1751; with Tunis, in 1751, and 1762; and with Tripoli, in 1751, and 1762.

36. The laws of Holland on the subject of recaptures, according to the detail given by Bynkershoek,(309) have undergone essential changes. The

(309) *Quæstiones juris publici*, lib. 1, cap. 5.

ordinance of the states-general, of the 4th July, 1625, declares, that if the vessel be recaptured before it has been twenty-four hours in possession of the enemy, the privateer recapturing shall be entitled to an *eighth;* if the recapture be made after forty-eight hours possession by the enemy, the recaptor shall be allowed a *fifth;* if after that time, one *third.* By an ordinance of the 22d July, 1623, the same rule was extended to recaptures made by ships of war. The ordinance of the 11th March, 1632, directs, that two *thirds* shall be adjudged to the privateer making the recapture, without any regard to the time, be it more or less, that the prize has been in the hands of the enemy. Another ordinance, of the 1st September, 1643, restores the provisions enacted in 1625. The ordinance of the 8th February 1645, re-enacts the regulations of that of 1632, adding, that in case the parties cannot agree on the value of the vessel and cargo, it shall be settled by the courts of admiralty. Another ordinance, of the 19th April, 1659, directs, without any distinction as to time, or the character of the recapturing vessel, that one *eighth* of the vessel and cargo should be adjudged to the recaptor. The ordinance of the 13th April, 1677, declares, in regard to privateers, that if the recaptured vessel or cargo, has not been forty-eight hours in the hands of the enemy, there shall be allowed to the recaptor in right of salvage *(voor borgloan)* a *fifth;* if she has been more than forty-eight, and less than ninety-six hours in the possession of the enemy, a *third;* and if for a longer time, an *half.* As to recaptures made by ships of war, the ordinance confirms the ancient

laws, without mentioning what they are. It seems, however, that we must understand by this, the ordinance of 1659, which repealed all prior ordinances.

37. The 8th article of the *placard* of the states-general, dated the 6th June, 1702, relative to the salvage to be allowed to privateers; the 7th article of that of 1747; the 7th article of that of 1781; and the 7th article of that of 1793, all contain the same provisions: they declare, that if a vessel or cargo belonging to the inhabitants of the United Provinces, captured by an enemy, should be recaptured by a privateer, or other vessel armed and equipped by Dutch citizens, the recaptors shall be entitled to receive for salvage, if the recapture was within forty-eight hours, one *fifth*; if after that time and within ninety-six hours, one *third*; if after a longer time, one *half*. These laws agree with those of 1677, but nothing is said relative to recaptures made by public ships of war, to which, it seems, the regulation of 1659 must still be applicable.

38. Besides the existing stipulations already pointed out, as to the subject of recaptures, between Holland and France, Spain and England, there are also some further stipulations with other powers. It is agreed by the 20th article of the treaty of amity and alliance of 1661, between Holland and Portugal, that if any vessel of one of the two powers, after being captured by an enemy or pirate, should be carried into the ports of the other, it shall not be allowed to be sold; and if in the space of three months in Europe, and

in one year, in every other part of the world, the owner shall reclaim his property, it shall be restored to him, on his paying the expences.(310) This, however, does not touch the subject of recaptures, properly so called, about which the treaty is silent; but an argument in favour of the restitution of vessels recaptured, may be drawn by analogy from the scope of this treaty.

39. The treaty of alliance and commerce between Holland and Sweden, of the 2d October, 1679, contains no express stipulation as to recaptures. It may be observed, however, that as by the 27th article, the king of Sweden engages to treat the subjects of Holland in the same manner as his own, he ought, in relation to prizes, to give the necessary orders that justice should be administered to them by impartial judges, and according to law and equity.(311) It is not putting a violent construction on this article, to apply it to the restoration of prizes recaptured, in cases where Swedish subjects would be entitled to restitution; considering also, that the 29th article is reciprocal, and enjoins the restitution of property retaken from pirates. The duration of this treaty was limited to twenty-four years, and it does not appear to have been renewed. The disputes which arose between Holland and Sweden, in 1713, in regard to the form of *sea-letters*, shows that doubts were then

(310) Dumont, *Corps diplomat.* tom. 6, part. 2, p. 367.

(311) Dumont, *ibid.* tom. 7.

entertained whether the treaty of 1679 remain still in force.(312) The declaration of the 28th October, 1741, appears to have renewed that part of the treaty only which relates to the form of sea-letters.(313)

40. There are no stipulations between Holland and Denmark, on the subject of recaptures, in their treaty of 1701; nor in the treaty of commerce between Russia and Holland, projected by the czar Peter I, but never executed. It only remains, therefore, to apply to those powers, as well as to Sweden, such principles as may be deduced from the system of the armed neutrality, to which they acceded in 1781.

41. The treaties made by Holland with the Algerines in 1760; with the Tunisians, in 1712; with the Tripolitans, in 1718; with Morocco in 1752, contain nothing on the subject of recaptures. The same may be said of the treaty of 1680, with the Turks, the 17th and 36th articles of which provide only for the restitution of property taken by pirates or corsairs.(314)*

(312) Lamberty, *Memoires*, tom. 8, p. 342.

(313) *Mercure d'Europe*, 1742, part. 1, p. 269, part. 2, p. 142.

(314) Dumont, *ibid.* tom. 7, part. 2, p. 4.

* The term *corsair* is derived from the Italian *corso*, which means a privateer as well as a pirate, but it is usually applied to vessels belonging to the African or Barbary powers....T.

Recaptures between Holland and the United States.

42. A particular convention relative to recaptures, was entered into, in 1781, between Holland and the United States of America,* by which it was stipulated, that property recaptured by privateers should be restored on paying one *third* for salvage, if the recapture was made before the prize had been twenty-four hours in the hands of the enemy; if retaken after a longer time, the whole became the property of the recaptors. If the recapture was made by a vessel of war of either power, restitution should always be awarded, on paying to the recaptors a *thirtieth*, if the recapture had been made within forty-eight hours after the capture; and if at a longer period, one *tenth* of the value of the vessel and cargo.(315) It may well be doubted, whether this convention, made at a time when these two powers were engaged in war against a common enemy, would be applied to future cases, in which one of them should be neutral.†

* See Laws of the United States, Vol. I, p. 463....T.

(315) Martens, *Collection of Treaties*, tom. 2, p. 279.

† In respect to the recapture of vessels belonging to the subjects or citizens of foreign governments in *amity* with the United States, the latter have adopted the equitable rule of *reciprocity*. The law relative to salvage in cases of recapture, passed the 3d March, 1800, is founded on principles of the greatest liberality and justice. By the first section of the act, it is declared, that if any merchant-vessel or goods belonging to any person or persons residing within or under the protection of the United States, taken by an enemy, shall be recaptured, before sentence of condemnation by competent authority, the same shall be restored, on payment of salvage, one *eighth* part, if retaken by a public vessel of the United States, and

Law of Denmark as to recaptures.

43. The ancient maritime law of Denmark, in 1561, contains nothing on the subject of recap-

one *sixth*, if the recapture was by a private vessel of the United States. And if the vessel, before the recapture, had been set forth and armed as a vessel of war, the former owner or owners, on the restoration thereof, shall pay one *half* of the value of such vessel of war or privateer. The second section provides, that if the vessel or goods so recaptured belonged to the United States, the same shall be restored to the United States; and the recaptors shall be paid out of the treasury of the United States, in lieu of salvage, one *sixth* of the value, if the vessel retaken was unarmed, and the recapture made by a private vessel; and one *twelfth*, if by a public vessel of the United States. For the recapture of a public armed vessel by a private armed vessel, *one half* the value shall be paid for salvage, and *one fourth* of such value, when such recapture shall be made by a public armed vessel of the United States. The *third* section provides for the recapture of the property of *aliens* in *amity* with the United States. It directs the restoration of the property to the former owners on their "paying for and in lieu of salvage such proportion of the true value of the vessel or goods so to be restored, as by the law or usage of such prince, government, or state, within whose territory such former owner or owners shall reside, shall be required on the restoration of any vessel or goods of a citizen of the United States, under like circumstances of recapture made by the authority of such foreign prince, government, or state; and where no such law or usage shall be known, the same salvage shall be allowed as is provided in the first section of this act." It provides, further, that no vessel or goods recaptured shall be restored to the former owner, in any case where the same shall have been condemned as prize by competent authority, previous to such recapture; nor in any case, where by the law or usage of the prince, government, or state, within whose territory the former owner shall reside, the vessel or goods of a citizen of the United States, under similar circumstances of recapture, would not be restored. Nothing, however, in this act, is intended to contravene or alter the terms of restoration in cases of recapture, agreed to by any treaty between the United States and any foreign power.

tures;(316) but by the maritime law of Christian V, (317) it is declared, that if a privateer recapture a Danish vessel, after it has been twenty-four hours in possession of the enemy, it shall belong to the recaptors; if the recapture was made before the expiration of the twenty-four hours possession, then the property was to be equally divided between the owner and the recaptor. This is the only law in Denmark relative to recaptures. Neither the ordinances concerning privateers, of the 5th April, 1710, and the 6th April, 1711, nor the ordinance concerning neutral commerce, in 1756, contain any provisions as to the rights of recaptors.(318) The last law relates only to the recapture of Danish vessels: The subject is left in doubt in regard to the recapture of vessels belonging to foreign powers or their subjects.

44. The subsisting regulations on this subject, between France, Spain, England, and the United Provinces, have been already mentioned. There are no

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The *fourth* section directs the money paid for salvage, when belonging to public armed vessels, to be distributed according to the law, for the distribution of prize-money: and when accruing to a private armed vessel, to be distributed among the owners and company concerned in the recapture according to their agreements, and if there be no agreement, then according to the order of the court having cognisance of the case. *Laws of the United States*, Vol. V. p. 33....T.

(316) *Westphalen. Monum. inedita*, tom. 4, p. 1831.

(317) *Codex legum Danicar.* lib. 4, cap. 7, § 6.

(318) Forord, af. Frid. IV, 1710, 1711, p. 53, 55. Hubner, *de la saisie des batimens neutres*, part. 2, appen.

positive stipulations concerning recaptures with Portugal; but she acceded to the armed neutrality proposed in 1782, by the powers of the North. The same may be said of the king of Naples, who has no special treaty as to recaptures, but who adopted the principles of the armed neutrality in 1783.(319)

45. The 11th article of the treaty of amity and commerce, between France and the Republic of Genoa, in 1789, contains a provision which is remarkable for the reasons on which it is founded. It declares that, if a neutral merchant vessel taken on the high sea, by a vessel of war, or privateer, is rescued or recaptured by a vessel of war or privateer of the contracting party, who is at war with the nation of the first captor, such vessel shall be immediately set at liberty to pursue her voyage, whatever may be the pretext for her first detention, and without any claim on the part of the recaptors, for any compensation or salvage, whether the vessel has been a longer or shorter time in the hands of the first captor; since no neutral vessel can ever be considered as a prize, until it has been lawfully condemned in a court of admiralty.(320)*

(319) Martens, *ibid.* tom. 3, p. 274.

(320) Martens, *ibid.* tom. 4, 532.

* It seems to be admitted by writers on this subject, as a general rule, that no salvage is due for the recapture of a *neutral* vessel. The right to salvage is founded on the fact of a meritorious service performed, a saving or rescue of the property from loss, or imminent danger of loss. If the property be *bona fide* neutral,

Law of Sweden as to recaptures.

46. Since 1667, a marine ordinance has been passed by Charles XI, of Sweden. It declares, that in

there is no danger of confiscation or loss, as it must be released with damages and costs for the unjust detention. The English court of admiralty departed from this rule, during the late European war, in regard to the recapture of neutral property from the *French*. The reason assigned by Sir William Scott was, that as the government and maritime tribunals of France had declared hostility against all the acknowledged principles of the law of nations and of natural justice, the innocence of the neutral was no protection against their rapacity. A recapture in such case was, therefore, clearly beneficial, and salvage had been decreed for such a service, and cheerfully paid by neutrals. Robinson's *Adm. Rep.* Vol. II, p. 299. *The war Onskan*, December, 1799. In a late case, however, the *Carlotta*, 1803, he refused salvage for the recapture of a Spanish vessel from the French, considering the maritime courts of France as evincing a disposition to return to the established principles of justice, and the ancient prize system of France, and because there was no evidence that the property was in danger of condemnation. Robinson's *Adm. Rep.* Vol. V, p. 54.

The supreme court of the U. S. in the case of *Talbot v. Seeman*, admitted the general rule to be, that according to the established law of nations, no salvage is due for the recapture of a neutral vessel. The reason assigned is, that the neutral being in no danger of condemnation, there was no benefit conferred by the recapture. To support a claim for salvage, the recapture must be lawful, and the service meritorious and beneficial. In this case, which was that of a *Hamburg* vessel, captured by a French corvette, and recaptured by a ship of war of the United States, the court decreed the vessel to be restored on paying *one sixth* for salvage. The grounds of this decision were, that the United States and France, in 1799, were in a state of partial war, and the recapture, therefore, lawful; that, though France and Hamburg were at peace, and neutral towards each other, yet, as by a decree of the French government of the 18th January, 1798, declaring, that every vessel laden with goods, the production of England or her possesions, should be lawful prize, whoever the owner might be, the Hamburg vessel, laden

case a vessel belonging to Swedish subjects, taken by the enemy, shall be recaptured, the recaptor shall be entitled to receive *two thirds*, and the owner the other third, without any regard to the time the property may have been in the hands of the enemy.(321) This law speaks only of recaptures made by privateers; but the king's ships have the same rights in regard to recaptures. The regulations concerning priva-

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with goods from Calcutta, would have been liable to condemnation; the recapture must therefore, be considered as beneficial and meritorious, as it saved the property from the risk of confiscation. Cranch's Reports, Vol. I, p. 1.

Martens is of opinion, that in the case of a recapture of a neutral vessel laden with contraband goods, destined to an enemy, and which the belligerent captor would therefore confiscate, the property ought to be restored, according to the principles of the universal law of nations and treaties. He does not state it to be the practice in Europe, to restore without salvage, in such a case, though he mentions the case of a Dutch ship in 1759, restored under similar circumstances, by a decree of the French council of prizes. He thinks it, however, just to grant the recaptor a right of salvage, since it is by his exertions that the vessel has escaped sentence of condemnation. But in case the vessel was perfectly neutral, and not liable to condemnation, the recapture would be void, and the vessel ought to be restored immediately and without salvage. In the case where two nations are at war with a third, or neutral to each other, he thinks neither is obliged to restore vessels recaptured to the other, where the capture and recapture were legal. But these and other distinctions made by Martens are rendered of little importance by the law of the United States. *Essay on Privateers, Captures, and Recaptures*, translated by T. H. Horne, § 52, page 137—141....T.

(321) *Ord. de la Marine*, 1667, part 7. *Ammirals-Keip Balken*, cap. 8, § 8.

teers, of the 8th February, 1715, of the 25th March, 1719, of the 28th July, 1741, and the declaration of the 14th August, 1741, contain nothing relative to recaptures, nor is any thing to be found on the subject in the articles of maritime war, of 1755. The government of Sweden, on the 1st July, 1788, published instructions for privateers.(322)*

(322) Kluit, *Histor. Fed. Belg.* part. 2, p. 439.—*Modee*, D. 6, p. 35, 96.

* The 17th article of the treaty of the 3d April, 1783, between Sweden and the United States of America, provides, that if one of the parties be at war, and the other remain neuter, and a merchant-ship of the neutral power shall be taken by the enemy of the other, and afterwards be retaken by a ship or privateer of the party at war, as well as all vessels and goods recaptured from pirates or sea-rovers, shall be restored to the owners on producing full proof of property. By the 18th article, which provides for the case of recapture, where both the contracting parties are at war against a common enemy, the same regulations as to restoration and salvage, are adopted as those contained in the convention of 1781, between the United States and Holland. *Laws of the United States*, Vol. II, p. 268, 270. By the 17th article of the treaty between the United States of America and Prussia, made the 10th September, 1785, the vessels and effects of the neutral party taken by an enemy of the other, or by a pirate, and retaken by that other, are to be brought into the port of one of the parties, and delivered into the custody of the officers of the port, in order to be restored *entire* to the true owner, on making due proof of his property. This treaty having expired, a new treaty was made between the two governments, the 11th July, 1799, for a further period of ten years. By the 17th article of the last treaty, the vessel or effects of the neutral power, taken by the enemy of the other, or by a pirate, and retaken by the power at war, are to be restored to the owner, on the same conditions as are stipulated in the 21st article, in regard to recap- [illegible] are both parties are engaged in a war against a common

Of the ransom of prizes.

ARTICLE VI.

Of the Ransom of Prizes.

§. 1. THE ransom of a vessel taken by enemies, is a contract under the law of nations, by which, on paying a specific sum, or a certain profit, the captor releases the prize, and restores it to its former owner, who may be said, in this manner, to acquire a new property.(323)

2. This ransom may be made at any time, and for any sum, by the parties interested, that is, the owners of the ship and cargo, if present, or, in their absence, by their agents or factors, or by the master himself, on the terms most advantageous, in the

enemy. These terms are, on paying *one eighth* of the value of the vessel and goods, where the recapture is by a public armed vessel, and one *sixth* when made by a privateer, where such recapture is made before the prize is carried into a neutral or enemy's port. *Laws of the United States*, Vol. V, p. 319—342. The last treaty is not so liberal as the first, in regard to the restoration of property recaptured, where one of the parties is neutral; since it obliges the owner to pay the same salvage as if his nation was at war with the captor, when, by the general principles adopted by the courts of Great-Britain and of the United States, the party at war would not be entitled to any salvage for the recapture of the property of the neutral party, unless under circumstances that would have certainly subjected the prize to confiscation by the captor. The 22d article makes it the duty of the vessels of war of each party, when both have a common enemy, or when both are neutral, to protect and defend the vessels of the other against all force and violence, when going the same course, in the same manner as they ought to defend and protect the vessels of the party to whom they belong,....T.

(323) Emerigon, ch. 12, sect. 21, § 1.

opinion of the crew.(324) The master being merely the lawful agent and attorney of the owners, who have entrusted the vessel and cargo to his care, he cannot make the ransom in his own name, or for himself, but it must always be considered as made for the account of the owners, according to the principles of reason and common sense.(325)

3. The ransom of a vessel may be made in two ways: the first and most usual is to fix the sum, for which the master of the captured vessel gives the captor a bill of exchange, and hostages for the due performance of the contract. The other is to pay down the ransom-money, or to deliver a part of the cargo, for the liberty of proceeding on the voyage.(326)

4. A question here arises, whether a person is bound to keep a promise made to a pirate, who has released him for a pecuniary sacrifice, and, consequently, whether he is obliged to pay a bill of ex-

(324) *Consolato del Mare*, ch. 227 et 228. *Ordonn. de France*, art. 66, tit. *des Assurances*: Valin, *Comment. Guidon de la Mer*, chap. 6, art. 3, 7 and 9.

(325) Dig. lib. 41, tit. 2, l. 18 et 42, *de adquir. possess.* Dig. lib. 41, tit. 1.—l. 13, *de adquir. rer. dom.* Dig. lib. 43, tit. 26, l. 6, § 1, *de precario.* Dig. lib. 17, tit. 1.—l. 10, § 3, *Mandati.* Dig. lib. 3, tit. 5.—l. 23, *de negotio gest.* Olea, *de cession. jur.* tit. 4. quæst. 2. Pothier, *des Obligations*, n. 74.

(326) *Guidon de la Mer*, chap. 6, art. 1. Kuricke, *ad jus marit. Hanseatic.* tit. 8, art. 4. Valin, *Comment.* on the 67th art. of the *Ordin. of France*, tit. *des Assurances.* Pothier, *des Assurances*, n. 135, &c.

change given to the captor. All writers on public law hold the affirmative.(327) Every engagement entered into with an enemy, is a lawful obligation, that ought to be faithfully observed. A bill of exchange, for the price stipulated for the ransom, is as binding on the drawer as any other commercial contract.

5. One of the crew of the captured vessel is often delivered to the captor as a security for the payment of the ransom, and is a kind of guarantee, or pledge for the performance of the contract. But if the hostage should be so base as to run away, or escape from the captor, or if he should happen to die, the terms of the ransom would continue equally binding, according to the principles advanced in the preceding paragraph.(328) He who, on account of the ransom, has left a hostage in the hands of the captor, ought to be the more exact in the performance of his engagement, for besides being bound by his promise, he ought, as speedily as possible, to restore the hostage to his liberty, which he has sacrificed for the benefit of the vessel and the owners; and the hostage, therefore, has a just claim upon them for an indemnity for all the damages and ex-

(327) *Si quando singuli hosti promiserint, est in eo fides servanda.* Cicero, *de Officiis*, lib. 1, cap. 13, lib. 3, cap. 29. Valerius Maximus, lib. 2, cap. 10, § 7. Burlemaqui, part 4, ch. 4. Grotius, *de jure belli ac pacis*, lib. 3, cap. 23. Puffendorf, *Jus nat. et gent.* lib. 3, cap. 6, § 11. Loccenius, *de jure maritimo*, lib. 2, tit. 3, n. 6.

(328) Valin, *des Prises*, chap. 11, n. 1 et 3. Vattel, *Droit des Gens*, liv. 2, § 254, and liv. 3, ch. 17, § 281, 286.

After the ransom, the captor must give a certificate.

pences which he has sustained in consequence of the privation of his freedom.(329) It was so decided by the parliament of Aix, by its decree of the 27th June, 1714. The admiralty of Rochelle have been in the practice of allowing the hostage, besides his lawful expences, half the wages he would have earned on board of the ransomed ship, during the time of his detention, and until his return to his own country.

6. After the ransom is agreed upon, the captor ought to give the captured vessel a certificate in writing, that may serve as a passport, and protect her against all other armed vessels of his nation, and enable her to continue her voyage, and reach her port of destination without being taken a second time. Thus, as long as the master of the captured vessel faithfully adheres to the obligations he has entered into, and which are expressed in the ransom-bill of which he is the bearer, his vessel will be protected from any further detention. If, on the contrary, he fail in any of the acts agreed to be done, or to fulfil the obligations he has contracted, he will be liable to be taken again by the vessels of the nation of the captor, to whom he paid the ransom, or by those of its allies; and in that case his vessel will also remain

(329) Grotius, *de Jure belli ac pacis*, lib. 3, cap. 10, § 52. Pufendorf, *Jus nat. et gent.* lib. 8, cap. 2, § 6, Marquardus, *de Jure mercat.* lib. 3, cap. 4, n. 38. Loccenius, *de Jure maritimo*, lib. 2, cap. 8, n. 5. Kuricke, *ad Jus Hanseaticum*, tit. 8, art. 4. Casaregis, *de commercio*, disc. 46, n. 21, et sequen.

Case of the enemy-captor taken with the ransom-bill.

hypothecated for the payment of the ransom agreed to be paid to the first captor.(330)

7. Valin, in his *Commentary on the Marine Ordinance of France*, and in his *Treatise on Captures*, ch. 11, sect. 2, n. 14, sect. 3, n. 5, supposes the case of a privateer, or other cruiser, who, after having made a prize, and ransomed her, is itself captured with the ransom-bill, and hostage given by the master of the captured vessel; and contends that the ransom-money belongs of right to the last captor, who may retain the hostage until it is paid to him, as having made two prizes at once.

8. Emerigon, in his *Treatise on Assurances*, chap. 12, sect. 23, § 8, combats the opinion of Valin, with a very just reflection. The ransom-bill, says he, is only the evidence of the obligation: Now, obligations are not objects susceptible of an actual possession, and the captor acquires those things only of which he makes himself master in fact. In regard to the hostage himself, it would be very strange, if he were to become a prisoner of war to his own countrymen. The enemy captor loses his right, in losing his hostage, and the friendly captor acquires a right only to the prize he has just made. He concludes, therefore, that the ransom-bill is at an end; that the hostage recovers his liberty; that the enemy

(330) Valin, *des Prises*, ch. 11, sect. 2 and 3. See also his Commentary on the Marine Ordin. of France, art. 19, tit. *des Prises*. Pothier, *des Assurances*, n. 137. Emerigon, *des Assurances*, ch. 12, sect. 21, § 11.

captor has lost all his claims, and that the friendly captor acquires nothing further than the actual prize he has taken.

9. To give more force to his argument, Emerigon considers the principles above advanced, in three points of view, that lead him to distinguish the three following cases, which I shall here adduce, the better to elucidate this question of maritime jurisprudence:

I. If the hostage landed by the *first* captor be retained a prisoner, his liberation ought to be procured at the expence of the ransomed vessel, or *in* any other way, though the ransom-bill may not be found on board the captured privateer.

II. If the ransom-bill be accompanied with a bill of exchange drawn by the master of the ransomed vessel, and it has been *bona fide* negociated to a third person, with the words, *value received in cash*, it ought to be paid by the owners of the ransomed vessel, though the hostage has recovered his liberty.

III. If the bill of exchange has not been negotiated with the clause value received, &c. and the hostage has recovered his liberty, the ransomed vessel is considered as exempted from all obligation towards the first captor, who, by his defeat, has lost all the rights he had gained in his cruise.

10. The same writer concludes, in support of
ciples, and I adopt his opinion, that a

right of action is an immaterial or intellectual thing, which is no more susceptible of material possesion than of physical recovery; that, in war, we acquire those things only which are taken and reduced to real possession; and that here the hostage is a friend, and the ransom-bill a paper of no value.

11. The fruits of privateering being given to the persons concerned in the privateer, merely as an encouragement and reward, and their interest being always subordinate to the general interest, the captain, consequently, cannot enter into any engagement, adverse to the general interest.(331) For this reason, the government of France, has very wisely thought it best, in order to prevent abuses which might result to the state from the ransoms exacted by cruisers, for the release of the vessels of enemies, to determine the cases in which the law would authorise such agreements. Considering the collusions to which the privilege granted to privateers of ransoming the vessels they captured gave rise; considering, especially, that by these ransoms, if, on the one hand, the privateer, freed from the necessity of carrying in his prize, could continue his cruise, and thus increase the number of his prizes; still, on the other hand, in case of the capture of a vessel of war, the sovereign of the nation to which the privateer belonged, would lose

(331) See the decision of the council of prizes at Paris, the 3d June, 1799, agreeably to the arret of the king's council, of the 7th December, 1675, and of the letter to the High Admiral, of the 25th December, 1757.

Ransoms prohibited by several maritime powers.

the advantage of weakening the enemy, and diminishing his naval forces, the king's council thought proper, by an arret of the 11th October, 1780, to confine ransoms to certain cases; and, finally, by the first article of the ordinance of the 30th August, 1782, they were entirely prohibited.

12. Similar considerations have dictated the regulations of many other maritime powers, who have prohibited their privateers and ships of war from offering or accepting any ransoms, declaring them null and void. Such are the acts of the parliament of Great-Britain, of the 19th Geo. III, chap. vii, sec. 11, 1779; and of the 22d Geo. III, ch. 25, sec. 13, 1782. The placards, of the states-general of the United Provinces, of the 2d June, 1689, the 12th January, 1690, and the 28th June, 1692; the ordinance of Russia, of 1787, article 27; and the 44th article of the ordinance of Spain, of 1779, allow privateers to accept of ransoms, when they have already three prizes in possession; and prohibits them in every other case.

CHAPTER V.

OF VARIOUS OTHER RIGHTS WHICH MAY BE EXERCISED ON THE SEA.

ARTICLE I.

Of the right of asylum granted to belligerents in the ports or seas of neutrals.

§ 1. ASYLUM is an acquired right, depending on the will of the sovereign in whose port it is sought. In a state of exact neutrality, the power that grants an asylum to the vessels of one of the belligerent parties, cannot refuse it to the other, without violating the principles of neutrality, which consist in a perfect impartiality, so as not to grant to one party, by receiving its vessels into his ports, a greater preference and favour, than is shewn to the other.

2. The neutrality adopted by a power becomes, from the moment of its publication, a sacred and general law for all who live and reside, in whatever character, or for whatever time, within the territories subject to the dominion of such neutral power. Thus every person, though a subject of one of the nations at war, while residing in the territory of a neutral, or passing through it, or while he seeks refuge there,

Conduct to be observed by those who reside in a neutral country.

ought, by his actions, to show himself indifferent to the disputes of the belligerents, to be quiet and peaceful, and to observe a perfect moderation in all his conduct. Whatever may be the inward feelings or sentiments of such person, sentiments for which he is accountable only to his Creator, and not responsible to human laws ;(332) yet, for his actions, and public conduct he is liable to the punishments ordained by the laws of the neutral state, for its own subjects, as well as strangers, though the latter usually suffer banishment.

3. From the same principle of universal reason it follows, that a neutral power owes protection, asylum and security, to all who are within its territory, whatever may be the motives that induced them to come there ; provided, they show themselves peaceful and submissive, and observe the laws of neutrality. On this condition alone, ought the territory of a neutral to be considered as that sacred asylum, which, according to the established principles of the laws of nations, belligerents are not allowed to violate.(333)

(332) *Cogitationis pœnam nemo patitur.* Dig. lib. 48, tit. 19, *l.* 18, *de pœnis.*

(333) *Pacatus utrique bellum gerentium plenissimam securitatem in suo territorio præstare debeat.* Sam. Coccei, *de jure belli in amicos*, § 18. Thomasius, *de jure asylii, &c.* dissert. 16. This was the opinion of nations the most rude. Cæsar, speaking of the customs of the Germans, in his time, observes: *Hospites violare fas non putant, sanctosque habent. De Bello Gallico*, lib. 5, cap. 5.

* Two modes in which belligerents are received into neutral ports.

4. Combining this theory with what actually takes place in neutral ports during a war, I observe, that no nation, however scrupulous it may suppose itself to be, in the observance of a perfect neutrality, has ever been so rigid in this respect, as to refuse, in every case, to admit into its ports, the privateers or ships of war of belligerent powers. In general, they are received into all neutral ports; but two different modes of proceeding in this respect have been adopted.

5. The usage of some ports is to grant to privateers, or armed cruisers, permission only to anchor in case of immediate danger, and to supply themselves with such articles of the first necessity, as they may want, without allowing them a free communication with the land, or permitting them to come on shore; so that they are treated as if they were infected with some contagious disease. When the sea has become calm, and they have supplied themselves with provisions, they are obliged to set sail and depart immediately with their prizes. Such was the practice adopted in the ports of the king of the two Sicilies, during the famous war of 1740, and 1756, and by the king of Sardinia, in the war of 1778.

6. Privateers and ships of war are received with more indulgence in other states. After the government of the port has ascertained that they are lawfully armed, after they have complied with all the requisite formalities, in regard to health, and have undergone the quarantine, to which vessels of war are subjected with more strictness than any other, on account of the

irregularity of their cruising, and the different vessels they visit, an entire and free communication with the port and city is never refused to them, so long as they observe the rules established in this respect; these it may be useful to mention, in this place, since they have been practised upon for a long period, in those ports of Europe that are the most frequented.

7. I. Privateers and all other vessels of war, must live in the greatest peace and tranquillity with all persons, and especially with the subjects and vessels of their enemies, though privateers or ships of war.

II. They are not allowed to receive on board, for the purpose of augmenting the number of their crews, any mariner of any nation whatever, not even those of their own country, who might happen to be enrolled for the military service.

III. They cannot increase either the number, or size of their guns, nor the quantity of their warlike stores.

IV. They ought not to keep watch in the port, nor endeavour to gain information of the vessels of their enemy, which are expected to arrive there. In case they discover any vessels of an enemy, they cannot go out of the port to attack them. If they do so, the artillery and vessels of the port may be employed to compel them to return.

V. They cannot set sail, as soon as an enemy-ship has weighed anchor; twenty-four hours, at least,

ought to intervene between the departure of the one and that of the other. Where that time has elapsed, if the enemy-vessel be still in sight of the port, their departure ought to be delayed, until the vessel is out of sight, and it is unknown what course she has steered.

VI. They cannot lie in wait, in bays or gulfs, nor conceal themselves behind capes or head-lands, or the small islands, belonging to the neutral territory, to be on the look-out, and ready to chase the vessels of their enemy. They ought not, in any manner, to hinder the approach of vessels of any nation whatever, to the ports and shores of neutral powers.

VII. While they are within the ports, or in the territorial sea of a neutral power, they can employ neither force nor stratagem, in order to recover prizes in the possession of their enemies, nor to deliver their countrymen who are prisoners.

VIII. They can neither sell, nor ransom prizes made by them, before a legal sentence has been pronounced on the validity of the capture.

8. The explanation of the two different modes in which privateers and ships of war are admitted into neutral ports, naturally leads to the question, which of the two is to be preferred, by a sovereign who is desirous of observing the most sincere and exact neutrality.

Opinion of Galliani as to the mode of receiving belligerents.

9. Galliani has anticipated me on this point, and has answered the question like a true publicist. I render homage to truth, and as my own opinion, on this subject, is in perfect conformity with that of Galliani, I shall merely repeat his words:(334) "In "the examination which I am about to make of "these two methods, all those who know my aver- "sion to the practice of privateering, will expect "me to prefer the first. It is certain, that those "who follow the first mode, show a more pointed "aversion to the calamities of war, since they are "willing to deprive themselves of the advantages "which would be derived from the great influx and "circulation of money, and the sale of prizes in their "ports, for the sake only of discouraging the practice "of privateering, that serves merely to prolong the "horrors of war. Yet, without censuring the first, I "prefer the second mode, as the most salutary and hu- "mane. To refuse to privateers or ships of war, a free "communication with neutral ports, to hinder them "from carrying or selling their prizes there, is not suf- "ficient to discourage persons concerned in privateer- "ing. Do we not see them run along the coasts and "shores even of an enemy's country, where they "certainly cannot flatter themselves with the hope "of finding an asylum in case of necessity? Of "what importance to them are the severe laws of "a neutral port, when, after all, they are sure of a "shelter from storms? And what will be the result?

(334) Galliani, *De' doveri de' principi neutrali, &c.* cap. 10, § 9, p. 443, et sequent.

Opinion of Galliani.

"The condition of the unfortunate prisoners will "only be rendered more hard and wretched, if the "captor be refused the liberty of landing them im- "mediately; they will be exposed to barbarous "treatment, dragged along through every sea in the "train of the captor, until his cupidity shall be sa- "tiated with the number of his prizes, in want of "every thing, reduced to the coarsest fare, loaded "with irons by the gloomy terror of the captain of "the privateer, or stifled at the bottom of the hold. "And who knows what other horrors the cruel ava- "rice of a corsair may have reserved for them? Per- "haps he may massacre them; perhaps he may "throw them into the sea, or compel them to em- "bark, without provisions, in a frail boat, to be "thrown by chance on the nearest shore. Is it "not to be feared also, that the commander of the "privateer may adopt the desperate resolution of "taking out of the captured vessel every thing valu- "able, and afterwards sinking, or blowing her up, "to the great injury of commerce in general, and of "humanity! At the sight of so many atrocities, I "shall applaud the side that admits privateers, (since "they still exist among Christians, and are not "yet extinct, nor sufficiently abhorred) into neu- "tral ports, for the comfort of the prisoners; for it is "not the advantage which may result to neutrals, "but the pity which is due to the vanquished, that "influences my opinion."

10. In order to decide what is the right of asy- lum and protection, that armed vessels of belli-

Mode of deciding on the asylum to be granted in various cases.

gerents may claim in the ports, or on the shores of neutrals, it is necessary to distinguish each case, and its circumstances, as to merchant-vessels and ships of war, the narrow or open ports and shores of the territorial sea, and, lastly, the reasons of their touching there.

11. The merchant-vessels of belligerents that enter the narrow havens, or within the territorial sea of a neutral power, for any cause whatever, ought to enjoy a sure and perfect asylum, provided, they are not laden with prohibited goods, as warlike stores and other articles contraband of war; for, in that case, they are no longer to be considered as merchant-vessels, but as vessels of war, in regard to which the question of asylum is to be determined according to the motives which induced them to enter the neutral port.

12. Three causes may oblige a ship of war to put into a neutral port or road. The first, and most usual, is the pressing wants of the ship or crew: that is to say, in order to avoid the danger of violent winds and currents, in keeping too near the land, for the sake of repairs, to procure rigging, to get provisions, to water, or to land the sick. The second is for the purpose of joining other ships of the same nation, in order to form a squadron, or to sail in company. The third is to avoid or escape from the superior force of an enemy, pointed out by signals from the land, or which the vessel itself has descried.

Neutrals may receive and assist vessels of war in necessity.

13. Each of these causes, by altering the case, may also vary its decision. I say, therefore, and I merely follow the opinion of Galliani, if any pressing necessity compel a vessel of war to put into a neutral port, it is an act of kindness and hospitality, to receive her with all that attention which her situation deserves; and that the neutral power cannot be accused of partiality, nor appear by this condescension desirous of prolonging the war. By furnishing the crew with what they stand in need of, he does no more than succour a fellow being, not a warrior; it is an act of humanity, not of animosity; it is administering to the necessities of life, not to the wants of war. Such is the right which every vessel of war has, in these cases, to protection and an asylum in neutral territory. On the same principle, the ship of his enemy can commit no act of hostility against him, while within such territory, without failing in that respect which is due to the sovereign of the place, who receives him under his safeguard and protection.

14. If one of the belligerents appoint a neutral port as a place of rendezvous for its ships of war, in order to form a squadron to act against his enemy, the latter ought always to respect the asylum afforded them. But if the sovereign of the port be informed of this design to rally forces, and of their true destination, and does not oppose it, while it is in his power, he then offends one of the belligerents by facilitating a hostile proceeding of the other,

Privateers pursued by enemies may seek asylum in a neutral port.

within his territory. This indulgence, passive as it may seem, is sufficient to forfeit the rights of a perfect neutrality: the neutral power can be no longer considered in any other light than an ally of the one and the enemy of the other, and the latter would have a right to act hostilely against him.

15. In the third case, that has been supposed, it is not a departure from the line of neutrality, to receive a ship that is obliged to seek a retreat in a neutral port, from the pursuit of a superior force. We cannot refuse an asylum to the unfortunate; besides, a ship, in this case, is, in strictness, obliged to be disarmed, so as not to set sail again, during the war, in order that the protection which prevented her from falling into the hands of enemies, should not become a cause of offence to them. In the code of public law, it is an incontrovertible principle, that the ports of neutral states are always an inviolable asylum, as long as the sovereign of the place cannot be accused of having disregarded the duties of neutrality.

16. Though the laws of war, as I have said elsewhere, authorise privateers to exercise every species of hostility against enemies, it is, nevertheless, unquestionable, that public faith, and the law of nations, forbid their molesting them in the ports, bays, and roads of neutral powers, towards whom such conduct would be a just cause of offence. The privateers of belligerent powers, exclaims D'Habreu,(335)

(335) D'Habreu, *Tratado de las presas*, part 1, chap. 5, § 16.

Conduct of the English in pursuing their enemies into neutral ports.

have no right to violate the asylum granted to them in the ports of a neutral state, nor to seize on the vessels of their enemies that may be found there. "The English," says he, "are the only nation who have been guilty of these outrages; without regard to any law, and against all reason, they seize the vessels of their enemies, in the sight, and under the very cannon of neutral ports: such conduct," he adds, "should not be considered as a rule of general practice, since no one is bound to regulate his behaviour by proceedings altogether unjust."

17. This passage of D'Habreu is not a slanderous invective. The English have been careful to evince by their conduct, that nothing has been invented against them in this respect. In 1794, Genoa, a neutral port, was witness to the unworthy perfidy of an English vessel. The French frigate *La Modeste*, reposing tranquilly under the protection and asylum granted by the perfect neutrality of the Genoese republic, saw, without suspicion, a ship of 74 guns place itself along her side, by a stratagem that increased her security. All at once the English ordered the French to lower their flag. On their refusal to obey the summons, flying ladders, already prepared, were thrown upon the frigate. The French, disarmed, were easily massacred: the English, in their boats, pursued the unfortunate men who had thrown themselves into the sea for safety, dispatched them with their oars, or precipitated them to the bottom of the waves, red with the blood of the victims.

ARTICLE II.

Of Reprisals, in time of Peace.

§ 1. AS all men are subject to the laws of nature, and, as their union in civil society cannot free them from the obligation of observing those primitive laws, since by their social union they do not cease to be men, the nation whose common will is the result of the wills of all its citizens, remains subject to the laws of nature, and, consequently, bound to respect them in all its proceedings. Now, since right springs from the obligations of a nation towards itself as well as towards others, every nation preserves the same rights that men derive from nature, and by the exercise of which they are enabled to discharge their duties. The laws of natural society are of such importance to the safety of every state, that if once accustomed to transgress them, no people can flatter themselves with the hope of maintaining their security or internal tranquillity, whatever measures they may take, or whatever precautions they may use for that purpose.* Every man

* Cicero speaks of the law of nature in terms of great comprehension and dignity :—*Est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna; quæ vocet ad officium jubendo, vetando a fraude deterreat; quæ tamen neque probos frustra jubet, aut vetat, nec improbos jubendo aut vetando movet. Huic legi nec obrogari fas est, nec derogari ex hac aliquid licet, nec tota abrogari potest. Nec vero aut per senatum, aut per populum solvi hac lege possumus. Neque est quærendus explanator, aut interpres ejus alius. Nec erit alia lex Romæ, alia Athenis; alia nunc, alia posthac: sed et omnes gentes, et omni tempore, una lex, et sempiterna, et immortalis continebit; unusque erit communis quasi magister et impe-*

Justice is peculiarly the duty of nations.

and every nation has a perfect right to those things, without which it could not exist, since this right corresponds with an indispensible duty. All nations, therefore, have a right to repress, by force, whoever openly violates these primitive laws of society, that nature has established between them, or whoever directly attacks the welfare and security of that society.

2. Justice is the basis of every society, the sure bond of intercourse among mankind. Unless that virtue, which renders to each man his own, be respected, human society, instead of being an interchange of assistance and good offices, would be nothing more than a scene of lawless rapine.* This virtue is far more necessary among nations than among individuals, since it is more difficult to obtain satisfaction, and in the conflicts between such powerful political bodies, the consequences of injustice are so much more terrible. The obligation imposed on all men to be just, may be easily demonstrated from the natural law; but, considering it as a truth sufficiently known, I shall content myself with observing, that nations are not exempt from this obligation, but that it is far more sacredly binding upon them, on account of the important consequences of their con-

rator omnium Deus. Ille legis hujus inventor, disceptator, lator; cui non parebit, ipse se fugiet, ac naturam hominis aspernabitur; atque hoc ipso luet maximas pœnas, etiamsi cætera supplicia, quæ putantur, effugerit. Ciceronis *Fragmenta, de repub.* lib. iii....T.

* *Fundamentum est autem justitiæ, fides; id est, dictorum conventorumque constantia et veritas.* Cic. *de Offi.* lib. 6. cap. 23....T.

duct. I have shewn, in the preliminary discourse, and it may be useful to repeat it here, that all nations are strictly bound to cultivate justice towards each other, to observe it scrupulously, and carefully to abstain from every act which may violate its precepts. Each one ought to render to others their due, to respect their rights, and not to disturb one another in the peaceful enjoyment of them. From this indispensible obligation, which nature has enjoined on all nations, as well as from those which bind each one to itself, is derived the power which every state possesses of not suffering another to deprive it of its rights, nor of any thing that lawfully appertains to it. In opposing every such attempt, it does no more than comply with its duties, which is precisely what constitutes right.

3. A right is perfect, when it is accompanied with the power of using force to carry it into effect. In vain, has nature given us the right not to suffer injustice; in vain has she made it the duty of others to be just towards us, if we cannot lawfully make use of constraint to enforce its execution, when they refuse to perform this duty. The property of nations, and of individuals, would be exposed to the mercy, the cupidity, and injustice of other nations; all rights would soon become inoperative and useless. Whoever offends the state, infringes its rights, disturbs its peace, or injures it in any manner whatever, declares himself its enemy, and becomes a just object of punishment. On the same principle, whoever maltreats a citizen is indirectly guilty of an

Duties of governments in regard to their subjects.

offence against the state that owes protection to its citizens. The sovereign of such injured person ought to avenge his cause, and oblige the aggressor, if he can, to make full reparation, or punish him; otherwise, the citizen would never attain the great object of every political association, individual security.(336)

4. A sovereign ought not to suffer his subjects to injure the citizens of another state, much less to offend the state itself; not only because no government ought to permit those who are under its direction to violate the principles of natural law, which prohibit all injustice, but because nations ought to treat each other with mutual respect, to refrain from every offence, wrong, or injury, in short, every thing which may do harm to others. If a sovereign who has it in his power to restrain his subjects within the rules of justice and peace, suffers them to insult a foreign nation, or maltreat its citizens, it wrongs that nation as much as if the ill-treatment proceeded from himself. In such case, the offended nation may regard the sovereign as the real author of the injury, in the commission of which the subject perhaps was no more than an instrument. Thus when a government is not satisfied with the manner in which its subjects are treated by the laws, the usages, or magistrates of another nation, it has a right to declare, that it will act in the same manner towards the subjects of that nation, as that nation acts towards its subjects. This is what

(336) Grotius, *de jure belli ac pacis*, lib. 2, cap. 25, § 1 et 2. Puffendorf, *de jure nat. et gent.* lib. 8, cap. 6, § 14.

publicists call the *law of retortion.*(337) Thus the Romans, as Cicero observes, often made war to avenge the ill-treatment offered to merchants and masters of vessels, who were citizens of Rome.(338) The same nation, after having refused to take up arms for mere allies, considered, that they could not refrain from war when these allies had become their subjects. For this reason the Campanians offered to unite themselves to the Romans, "since, they observe, though you would not defend our property against injustice and violence, you will defend it when it is your own."(339)

5. If then a nation seize on what belongs to another; if it refuse to pay a debt, to repair or give satisfaction for an injury, the injured party may seize things belonging to the wrong-doer, and apply them to his own use, until he is paid the amount that is due, with damages and interest, or he may detain them, as a security, until full satisfaction be given. In such case, the right of reprisal is exercised; a right

(337) *Retorsion de Droit.* Vattel, *Droit des Gens,* liv. 2, chap. 18, § 341.

(338) *Majores vestri sæpe mercatoribus ac navicularüis injuriosius tradatis, bella gesserunt.* Cicero, *Orat. pro lege manilia,* cap. 5. *Quot bella majores nostros et quanta suscepisse arbitramini, quod cives Romani injuria adfecti, quod navicularii retenti, quod mercatores spoliati dicerentur. In Verrem,* lib. 5, cap. 58.

(339) *Quandoquidem,* inquit Princeps legationis Campanorum, *nostra tueri vim atque injuriam justâ vi non vultis, vestra certe defendetis.* Tit. Liv. lib. 7, cap. 31.

Right of governments to grant letters of reprisal.

that every sovereign and independent prince possesses, of doing himself justice, for the wrong suffered from another power, or its subjects, and for which no satisfaction has been given. In other words, it is the right which governments have of granting to their subjects letters of reprisal, by which they are authorised to seize the vessels and goods belonging to subjects of another sovereign, in order to indemnify themselves for the injuries they have received, and for which all reparation has been refused.(340)

6. The effects thus taken, are kept as long as there is a hope of obtaining justice or satisfaction. As soon as that hope is lost, they are confiscated, and then the reprisal is complete. If the two nations, on account of this dispute, come to an open rupture, satisfaction is considered as refused from the moment war is declared, or hostility commenced, and, then also, the effects seized may be confiscated.*(341) This is agreeable to the principles of universal law, that when the aggressor perseveres in a denial of justice, the govern-

(340) Loccenius gives the following definition of reprisals: *Est jus prœhendendi ac detinendi bona et corpora subditorum, etiam exterorum in compensationem injuriæ et læsionis quæ in publicum detrimentum precipue vergit. De jure maritimo*, lib. 3, cap. 5, n. 2.

* Vattel, *ibid.* § 342.....T.

(341) *Tali igitur de causa, aut corpora, aut res mobiles subditorum ejus qui jus non reddit capi posse, non quidem naturâ introductum est, sed passim moribus receptum.* Grotius, *de jure belli ac pacis*, lib. 3, cap. 2, § 5, n. 2....T.

ment offended, has a right to declare war, as the only means of obtaining reparation for the injury or wrong it has sustained ;(342) and from that time the property of the aggressor which has been seized, may be confiscated for the benefit of the party injured.(343)

7. There can be no doubt, that the property of individuals makes a part of the whole property of the nation. Every thing which belongs to the members is considered as belonging to the body politic, and is answerable for the debts of that body.(344) It is a direct consequence from this principle, that if a nation has a right to a part of the property of another nation, it has a right to the property of its citizens, without distinction, to the amount of the debt.(345) Whence it follows, that in case of reprisals, the goods of the subject are seized in the same manner as those

(342) *Nullæ repressaliæ aut arresta tam terra quam mari ratione cujuscumque injuriæ nisi justitia pluribus vicibus repetita non administratur, admittentur.* Loccenius, *de jure maritimo*, lib. 3, cap. 5.

(343) *Nam universo patrimonio suo factum Principis tueri tenentur, adeoque totum hoc patrimonium læsis est obligatum ; unde et in bello id occupare licitum est.* Cocceius, *ad Grotium*, lib. 3, cap. 2, § 2.

(344) *Si quis patriæ meæ pecuniam credat, non dicam me illius debitorem, nec hoc alienum profitebor : ad exsolvendum tamen hoc, portionem meam dabo. : . . . . . unus è populo non tanquam pro me solvam, sed tanquam pro patria conferam, et singuli debebunt non tanquam proprium, sed tanquam publici partem.* Seneca, *de Beneficiis*, lib. 6, cap. 19 et 20.

(345) Vattel, *ibid.* liv. 2, chap. 7, § 82.

Reprisals used in ancient as well as modern times.

of the state or sovereign who has refused the satisfaction that is due from him.(346) On these principles, reprisals are reckoned among the means, used to compel a nation, that disturbs the navigation of other nations, either by depredations, or by infractions of its treaties, or by feigned delays in making reparation for the damages it has caused, to conduct itself, in future, with equity and moderation towards nations at peace.(347)

8. Though the term *reprisals* be modern, yet the thing appears to have been practised at all times among free nations. An example of it is to be found in Homer,(348) where Nestor boasts of having, by way of reprisal, carried off the flocks of the Eleans, to avenge an insult done to his father. Livy mentions the instance of Aristodemus, heir of the Tarquins, who stopped, at Cumæ, some vessels belonging to the Romans, in order to indemnify himself for the property of the Tarquins, detained at Rome.(349) Aristotle informs us, that among the Carthaginians, there

(346) Grotius, *de jure belli ac pacis*, lib. 3, cap. 2, et Cocceius, *ibid.* in notis.

(347) *Ob repressalias vero aut arrestum injustè alicujus navi, mercibus aut corpori impositum, damnum cum omni causa et expensis resarcietur.* Loccenius, *de Jure maritimo*, lib. 3, cap. 5, § 9. See also Grotius, *de jure belli ac pacis*, lib. 3, cap. 2, § 7, et Cocceius, ibi in comm.—Gail, *de arrest. imp.* cap. 13.

(348) Iliad, book 11, l. 697.

(349) Tit. Liv. *Histor.* lib. 2, cap. 34, § 4. Dion. Halicar. relates the fact differently, but in the same sense, as done by way of reprisal. Cap. 12, p. 411, edit. Oxon.

Instance of reprisal among the Carthaginians.

were some who possessed the right of reprisal. These are his words :(350) "The Carthaginians had in their pay a great number of foreigners, the wages due to whom they were unable to discharge. To procure the means of paying off these debts, they devised the following expedient: They gave public notice, that those citizens or inhabitants who had a right of making reprisals in regard to any nation, or individual, and who wished to make the best use of this right, to come forward and declare it. A great number of persons appeared, and they began by seizing vessels entering the Euxine Sea, under some specious pretext; after this, they fixed a time at which they should be adjudged good prize. By this means, they collected a large sum of money, and were able to pay off the troops, who were discharged. The state applied a part of its revenues, to indemnify those whose property had been unjustly taken."

9. As reprisals are almost always a prelude to war, it necessarily follows, that the right of granting them, to individuals, must exclusively belong to that power in whom is vested the right of declaring war.(351) The writers on public law unanimously agree, that the crime of a subject is not to be imputed to the sovereign, so as to authorise reprisals, unless he refuse

(350) Arist. *in Œconomic.* lib. 2, p. 503, edit. Rom.

(351) *Privati jure repræsaliarum uti sine Principum aut Reipublicæ consensu, auctoritateque non valent; quibus enim belli gerendi jus non est, iis nec represalias decernere licet.* Bynkershoek, *Quæstiones juris publici*, lib. 1, cap. 24.

to give adequate satisfaction. The rule, therefore, is for the sovereign of the party injured to apply to the sovereign of the party who has committed the offence, and to demand of him a just and full satisfaction; and, until this is refused, which may sufficiently appear from a pointed neglect to the application, or from affected delays, *letters of reprisal* ought not to be granted. Such is the regulation contained in the marine ordinance of France, art. II, tit. *Des Represailles,* in which the king declares, that he will not grant letters of reprisal, until after he has made, through his ambassadors, suitable representations in form, and after the time mentioned in the treaties existing with the states and sovereigns, whose subjects have committed such depredations.

10. There are several treaties which contain provisions on this interesting subject, for the purpose of restraining the practice of reprisals, as being a rigorous mode of proceeding. Thus, by the 24th article of the treaty of 1654, between England and Holland, it was agreed, not to grant letters of reprisal before the sovereign of the subject who complained of being injured, had made representations to the government of the person who had done the wrong; and in case only that the latter did not, within three months after, render justice to the injured party. So, in the 17th article of the treaty of 1662, between Louis XIV, and the states-general of the United Provinces, it is stipulated, that reprisals should not be used, unless there had been a denial of justice; and justice was not to be considered as having been de-

...e the complaint of the injured party had ...mmunicated to the ambassador of the sove... ... of the subjects against whom they claimed the ... of reprisal, nor unless, within four months there... ...er, justice had been refused to the party com... ...aining.(352)

11. The 16th article of the treaty of Utrecht, made the 11th April, 1713, between France and England, and which agrees with the 9th article of the treaty of Ryswick, contains the following provisions: "That in future one of the two powers shall not deliver letters of reprisal against the subjects of the other, if there is not a manifest delay or denial of justice; and this is not to be considered as proved, unless the petition of the person who demands the letters of reprisal has been reported or represented to the minister or ambassador of the prince against whose subjects such letters are demanded, and who may be in the country, in order, that within four months, he may gain information on the other side, or that the offender may make immediate satisfaction to the person complaining; and if there be no minister or ambassador of the prince at the place, no letters of reprisal shall be issued, until after the expiration of four months, reckoning from the day that the petition has been presented to the prince, against whose subjects such letters are asked, or to his privy council." This is also in substance, or equivalent terms,

(352) The treaty of the Pyrenees, art. 27, contains the same provision.

stipulated in the 3d article of the treaty of commerce, between the same powers, and in the other treaties, concluded with other governments, at Utrecht; so that on this subject there is a conventional law generally sanctioned in Europe.

12. In modern times, nations have, often, made use of reprisals, when the freedom of maritime commerce has been violated. They have sometimes carried too far a right, the exercise of which ought to have some bounds, and which, when not exerted with moderation, often occasions violent wars. In such cases, reprisals become acts of hostility, and belong to that class of acts that relate to the rights of war.

13. By the treaty of Aix-la Chapelle, concluded the 6th October, 1748, between France and Spain, on the one part, and England on the other, it was agreed, that all prizes, made by either side, before a positive declaration of war, should be restored. This stipulation did not prevent the English, seven years afterwards, on the 8th June, 1755, before any declaration of war, from attacking two French ships of war, the *l'Alcide* and the *Lys*, off Cape Raz, in the island of Newfoundland, under pretence of reprisal, on a supposition that France had invaded the possessions of Great-Britain, in America. These ships, with many others, were not restored at the peace of 1763, though Louis XIV, had ordered a British frigate, taken by the Brest squadron, by way of reprisal, to be restored; "not wishing," said

Conduct of England in making reprisals, before a declaration of war.

his majesty on this occasion, " to make war in time of peace, or to be the first to break the treaty of Aix-la Chapelle."

14. The English government had, for a long time before, been in the practice of transgressing the sacred laws of nature and of nations, by commencing hostilities before any declaration of war, and, of capturing the vessels of other powers, during a profound peace, under the specious pretext of reprisals. In 1664, they attacked the Dutch fleet, that sailed securely out of Bourdeaux, confiding on the faith of treaties. The whigs, who at that time, were not accustomed to such exploits, raised loud clamours. To such shameful infractions of law, Milton alludes, when speaking of the king of Syria, who, in like manner, began hostilities against the king of Israel, without declaring war :

> ——— who to surprise
> One man, *assassin like, had levied war,*
> *War unproclaimed.**

But the commencement of the war of 1757, and of those that have subsequently taken place, has al-

* *Paradise Lost*, book 11, l. 218. Bynkershoek is of opinion, that after satisfaction has been demanded and refused, a declaration of war is not required by the law of nature or nations, though it may be often practised among the nations of Europe. *Sed et potest bellum recte incipere a negata petitione, quid enim a vi distat negata petitio? . . . . Sed excutiamus rationem, cujus tanta vis est in jure gentium definiendo. Hæc autem, ut modo, dicebam non alias solemnitates desiderat, quam ut amice repetamus, quod nobis manu ademptum est;*

most obliterated this ancient injury from the memory. The present government of Great-Britain, has just furnished an example, that more solemnly declares its ordinary policy, and its own peculiar law of nations. It is not two months since an English squadron, duly commissioned, and furnished with secret orders, in the midst of peace, and at the moment of a negotiation opened with Spain to consolidate that peace, attacked a Spanish squadron, consisting of four frigates, off Cape St. Mary, one of which was blown up, three hundred passengers and many women and children destroyed, and the other frigates captured with all their treasures on board, and the crews brought prisoners to England.

15. Agreeably to the principles laid down in the preceding pages, the effects taken by way of reprisal, belong in full right to the person who takes them, but to no greater amount than is due to him, comprehending the expences of the proceedings in the court for the purpose of obtaining an adjudication on the property. Grotius adds, "that these proceedings ought to be according to the rules of the civil law; the parties interested are first cited to appear, afterwards the goods are sold, or adjudged to the cre-

quin forte nec amica repetitio desiderabitur, quia vim vi repellere omnes leges omniaque jura permittunt, nec scio, an ullas solemnitates, quibus vis repellatur, jus gentium noverit .... Ratio, ipsa, inquam ratio, juris-gentium est anima, et si de ea disputes, nihil omnino est, quod indictionem urgeat, sed plura, quæ dixi, urgent, ne necessariam putemus. Quest. Juris Publici, lib. 1, cap. 2.....T.

ditor by the authority of the judge, and the residue is restored."(353)

16. The marine ordinance of France, of 1681, is in this respect, more agreeable to strict justice. After regulating the conditions which must precede, accompany, and follow the granting of letters of reprisal, the 6th article declares, that the things taken shall remain in the hands of the king, and his courts of justice, and not be left to the disposition of the reprisors, who are to receive nothing except by authority of the tribunals, and so much only as may amount to a just indemnification. Things taken by way of reprisal, shall not be adjudged good prize, unless they have been seized according to the rules and conditions expressed in the letters of reprisal granted to the captor, and unless taken from the subjects of that state which has refused to make reparation for the wrong. These reprisals can alone be legally decided upon by the council of prizes, the only court competent to take cognisance of maritime captures.

17. Captures made by way of reprisal, differ from those made during a war; in the first, after satisfying the captors what is due to them, the residue of the proceeds of the goods, do not belong to the privateer or its crew, as in the other case, but must be deposited in the court that has decided on the cause, in order that they may be restored to the right owner, or the person on whom the reprisal has been made.

(353) Grotius, *de jure belli ac pacis*, lib. 3, chap. 2, § 7, n. 5.

Residue of proceeds, after satisfying the captor, is restored to the owner.

From that period, the first possessor continues the true proprietor of the thing, which is no further liable, after the wrong that gave rise to the reprisal has been fully repaired. This is agreeable to the law of nature and nations, in which the civil law has made no alteration, except for the better regulation of the right of reprisal. The owner of goods thus seized, has therefore a right to reclaim what remains of the proceeds, unless a war between the two powers should intervene, in which case the sum deposited may be liable to confiscation. In all these cases, however, the party, whose property has been seized, may have recourse against the person obtaining the letters of reprisal, if by a false or exaggerated statement, he has led the government granting such reprisals, into an error.(354)

18. The marine ordinance of France has gone farther in providing for this case. By the 8th article, title, *des represailles*, it is declared, that "the persons obtaining letters of reprisal, who thus prevaricate, shall be condemned to pay the owners of the goods seized, all the damages and costs, and restore fourfold the amount of the sums they may have received." Valin, in his commentary on this article, does not consider it as relating to letters of reprisal, obtained upon suggestions utterly false, otherwise, says he, the

(354) *Ob represalias vero aut arrestum injustè alicujus navi, mercibus aut corpori impositum damnum cum omni causa et expensis resarcietur.* Loccenius, lib. 3, cap. 5, § 9. Grotius, lib. 3, cap. 2, § 7, et Coccei Comment. Jacob. a Canibus, *de represaliis*, n. 36. Ferretus, *de re navali*, lib. 5, n. 27.

crime would merit a punishment proportioned to its enormity. He understands it to mean, that, in order to render the persons liable to the punishment inflicted by this article, it is sufficient, that they have so disguised or exaggerated the facts, that there is in reality no proportion between the wrong actually sustained, and that represented to the government, that is, between the sum really due, and that for which they have solicited the power of making reprisals. But M. Valin does not reflect, that the punishment of a four-fold restitution, declared by the ordinance, is the same which the ancient laws inflicted for the crime of theft. Now, as the person, who, under pretext of reprisals, pays himself what is not due, or more than is due to him, is, in fact, guilty of robbery, it was quite natural that the legislator should inflict the punishment which the Roman laws had attached to that crime. Besides, such, for a long time, were the principles of the French jurisprudence, on this subject, as appears from the *Guidon de la mer*, chap. X, art. V, and from the *Bibliotheque* of M. Borchel, voc. *Represailles*.

19. The precautions taken by civilised governments to prevent the abuse which individuals might make of letters of reprisal, in obtaining them on too slight grounds, have rendered the use of this expedient, at the present day, extremely rare. Reprisals have been limited as to their object, by allowing them to seize only the goods of a foreigner, without the state, or those which the debtor himself may possess, within the territory subject to the jurisdiction of

Reprisals in modern times have been rare.

his sovereign.(355) In modern times, it has been thought preferable to direct the seizure of goods, intended to be applied as an indemnity to the injured subjects, to be made in the name of the government. Thus the king of Prussia, listening to the complaints of his subjects against the English privateers, ordered in 1753, the seizure of the debts due to the English merchants, in his dominions.(356)* Thus the states-general of the United Provinces, in 1783, ordered the seizure of some Venetian vessels, in order to compensate M. M. Chamel and Jordan, for their claims against M. Cavalli, resident of the Republic of Venice, at Naples.(357) So, also, the king of Spain, in 1796, directed English property in his dominions, to be seized and applied as an indemnity, for the illegal detention of the Spanish frigate *Minerva*.(358)

(355) The examples furnished by France as to letters of reprisal are very few: The most ancient is that of 1596, and the most recent that of 1778, the granting of which was without effect, on account of the war with Great-Britain, that supervened. *Code des Prises*, tom. 1, p. 25.

(356) See *Exposition des motifs, &c.* printed at Berlin in 1752, in quarto, a work written by order of the king, with great spirit and ability, against the English cabinet.

* These debts were for sums due from the empress queen, and charged upon Silesia, and which the king of Prussia, by the treaties of Breslau and Dresden undertook to pay, in consideration of the cession of that country to him. See the *Duke of Newcastle's Answer to the Prussian Memorial, &c.*...T.

(357) Hausen, *Neue, staatskunde von Holland*, st. 1, p. 165.

(358) See the Manifesto of his Catholick Majesty of the 5th October, 1796.

Opinions of certain writers as to the practice of privateering.

ARTICLE III.

Of Privateering, Privateers, and Pirates.

§ 1. SOME pretended philosophers have indulged in much declamation against privateers and privateering, and have reprobated this mode of carrying on war. It is not in this manner, they observe, that a state ought to be served; for the profit gained by individuals is illicit and dishonorable. This language, delivered under the specious appearance of wisdom and great delicacy of conscience, is mostly for the sake of diverting the attention from the truth, and the better to conceal the secret motive of their indifference to the welfare and advantage of the country they hate. As much, then, as these declaimers are censurable, so much are they worthy of praise, who generously expose their lives and fortunes to the dangers of privateering. "As they are in a better situation, in some respects," says Valin on this subject, "to annoy the enemy, than the government with its apparatus of formidable fleets, they render an additional service to their country, by relieving it from the burden of arming, at its own expence, a great number of vessels which, without their aid, it would be obliged to fit out as cruisers."(359)

2. The name of pirate has often, very improperly, been confounded with that of a privateer, or corsair, for the reason, perhaps, that the desire of taking

(339) Valin, *des Prises*, chap, 1, § 6.

Definition of a pirate.—Different from a privateer.

prizes, is the motive which actuates both; but the difference between them is so great and essential, that there is not the least plausible reason for confounding them together.

3. A pirate is one who roves the sea, in an armed vessel, without any commission or passport from any prince or sovereign state, but solely on his own authority, and for the purpose of seizing by force, and appropriating to himself, without discrimination, every vessel he may meet.(360) For this reason, pirates have always been compared to robbers: The only difference between them is, that the sea is the theatre of action for the one, and the land for the other.(361) For this reason, the Romans, according to Diodorus Siculus, lib. 20, in order to render the navigation of the Grecians and other maritime ports secure, vigorously pursued the pirates who infested the seas. The highest praise merited by Augustus

(360) *Hostes hii sunt, qui nobis, aut quibus nos publice bellum decernimus; cæteri latrones, aut prædones sunt.* Dig. lib. 50, tit. 16, l. 118, *de verborum significatione.* Casaregis, in his work on commerce, describes still better the character of a pirate. *Nam proprie pirata ille dicitur, qui sine* patentibus *alicujus principis ex propria tantum ac privata autoritate per mare discurrit deprædandi causa.* De Commercio, disc. 64. n. 4. Ansaldus, *de Commercio et Merc.* disc. 14, n. 3. Hubner, *de la saisie des batimens neutres,* part. 2, ch. 3, § 6.

(361) *Inter piratam et latronem nulla alia est differentia, nisi quia pirata deprædator est in mari.* Santerna, *de Assecurationibus,* part. 4. n. 50. Stracca, *de nautis,* part. 3, n. 30. Loccenius, *de jure maritimo,* lib. 2, cap. 3, § 1.

The practice of privateering is very ancient.

was that of having cleared the sea of the pirates who annoyed the commerce and navigation of the mediterranean. This eulogy is preserved on an ancient inscription found at Ancyra; *Mare pacavi a predonibus.*

4. The owner of a privateer, on the contrary, is a simple individual, who, after having obtained from his government special authority and licence for that purpose, generally called *letters of marque*,(362) equips

(362) The practice of granting to individuals *letters of marque* to cruise against the enemies of the state, is very ancient. These commissions existed in the twelfth century; and Duncange, under the word *Marcha*, quotes a commission dated in 1152. But, at that time, this right had no relation to reprisals, or to the power of seizing, by private authority, the goods or persons of those against whom they had any demand or complaint. Towards the close of the thirteenth century, other examples occur of subjects requesting from their sovereigns *letters of marque*. Thus, Edward I, king of England, says, in a letter dated in 1295; *Bernardus nobis supplicavit, ut nos sibi licentiam* marchandi *homines et subditos de regno Portugalliæ, et bona eorum per terram et mare, ubicumque eos et bona eorum invenire posset, concederemus, quousque de sibi ablatis integram habuisset restitutionem.* It seems, however, that it was not until the fourteenth century, that the practice was introduced of considering it necessary to be furnished with *letters of marque*. It is only at this period that we find any mention made of them in the laws of maritime powers, and in the public treaties concluded between them. In an ordinance of Philip-le-bel, in 1313, which refers to the treaty with the king of Arragon, it is said, that previous to having any recourse to the right of *marque*, a friendly requisition should be made. *Ut de requisiti in rendenda justitia defectu constet illi qui* marcham *indicere voluerit per literas regias vel alia publica instrumenta antequam ad dictam* marcham *faciendam procedat.* In the treaty of Treves, between Great-Britain and France, the 7th

The authority of privateers is derived from government.

one or more vessels, and sends them to cruise only against the declared enemies of his country. Privateering is not, therefore, a private act, by which an individual of the nation, at his own will and pleasure, undertakes enterprises against the enemies of his country. The government alone has the right to make war and carry on hostilities, and to order and direct the employment of whatever makes a part of the means of warfare. Hence, it is the government that gives to the privateer the special and necessary authority to pursue, fight and capture the vessels of an enemy. In this sense is Casaregis to be understood in the very elegant discourse delivered by him, the 14th October, 1733, before the Grand Duke of Tuscany, whom he addresses in the following words: "There is no doubt that this is your case, for this reason, that the commander of a ship of war or public cruiser, furnished with a commission, and carrying the flag of your royal highness, cannot, and ought not to be considered as an individual, but as representing the person of his prince, and as an officer of war, who, in regard to the equipment and economy of his vessel, has the same power and

May, 1360, provision is made that *reprisals, letters of marque*, and *counter-marque* should cease. See Dumont, *Corps Diplomatique*, tom. 2, part. 1, p. 16. Rymer, tom. 2, p. 291. Ducange, V. *Marcha.*†

† See Martens, Essay on Privateers, &c. ch. I, § 4.....T.

A privateer without a commission may be treated as a pirate.

jurisdiction as the general of an army."(363) Such is the declaration of the king of France, on this subject, the 24th June, 1778, in which he makes known his intention to reward, by marks of honor and distinction, such privateers and cruisers as should signalise themselves by any considerable enterprises against the enemies of the state. Thus, whoever is desirous of fitting out a privateer, must, according to the law of all countries, at the present day, be provided with *letters of marque*, or a commission from one of the belligerent powers,(364) for want of which he may be treated and punished as a pirate, as well by those against whom he commits violence, as by his own government.(365)* *Letters of marque*

(363) Casaregis, *de Commercio*, disc. 214, n. 57.

(364) Ordinances of Spain, of 1662, 1718, and 1779, art. 1. Ordinance of France, in 1400, and of the marine in 1681, tit. *des Prises*, art. 1. Ord. for the Admiralty of Holland, of 1489, art. 1. Ord. of Denmark, in 1710 and 1711, art. 1. Ord. of Sweden, in 1715 and 1741, art. 1. Acts of Great-Britain, 9 Edward IV, 28 Henry VIII, ch. 15—12 and 13 William III, c. 7.

(365) See the disputes, for instance, between Denmark and Sweden, on the subject of the expedition of Carloff in 1658, mentioned by Puffendorf, in his work *de rebus gestis Caroli Gustavi*, lib. 5, § 40; also, the remarkable case which occurred in France, where Messrs. Gradis, of Bordeaux, fitted out, with the king's permission, the royal frigates, *l'Opale* and *la Bruna*, and took four English ships, but not being furnished with a commission for war, their prizes were confiscated by a decree of the 31st January, 1761. Emerigon, *Traité des Assurances*, tom. 1, p. 574.

* Martens, *Essay on Privateers, &c.* ch. 2, § 10, p. 36....T.

Orders issued to regulate the conduct of privateers.

therefore, are essential to characterise a privateer, and distinguish it from a pirate.

5. It has, for this reason, been generally established, that privateers destined to harass the enemies of the state, must always conform to the rules and ordinances relative to their government and conduct; these rules pronounce various punishments and penalties against abuses and frauds, the least of which is the privation of all the acquisitions made from the enemy. These laws, besides, fix the conditions requisite to render the prize legal, and to secure to the captors the reward of their exertions. How wise soever these regulations may be, they have not provided for all the cases that may arise in the carrying on of hostilities against an enemy; but there is always a point fixed that may serve for an invariable rule in those circumstances, which may have escaped the foresight of the legislator.(366)

6. The orders which it is the practice of every belligerent power to publish for the regulation of privateers during a war, though generally founded in reason, and proceeding often from just motives, yet vary according to the times and causes which induced their publication. For this reason, they are always susceptible, " in their application," to use

(366) Valin, *Traité des Prises*, chap. 1, § 7. D'Habreu, *las Presas*, ch. 9, § 1. Casaregis, *de Commercio*, disc. 24, n. 25, et disc. 136, n. 10. De Luca, *de Regaliis*, disc. 170, n. 71. Targa, *Ponderaz. Marit.* cap. 61.

Orders relative to privateers are temporary and variable.

the language of M. Portalis,(367) "of being temper-
"ed by considerations of wisdom and equity. In
"the execution of orders of a rigorous nature, we
"ought rather to restrain than to extend their force;
"and of the different interpretations of which they
"are susceptible, we ought to prefer the one most
"favourable to justice and liberty..... Right does
"not grow out of these orders, but the orders ought
"to grow out of right. Consequently laws or particu-
"lar rules ought always to be executed in a manner
"the most agreeable to universal reason, especially
"when they relate to matters connected with the
"law of nations, as to which legislators are always
"proud to be no more than the respectful interpre-
"ters of the law of nature."

7. The rules concerning the conduct of privateers, therefore, vary, and they ought to vary, according to times and circumstances. They are not, properly speaking, laws, because they are not permanent, and the execution of them is always subservient to the policy of the moment. At the commencement of a war, they often incline to extreme severity; but when nations, fatigued with hostilities, at length feel the necessity of enjoying the sweets of peace, they lean towards equity. From the numerous laws, and

(367) See the learned opinion delivered in the council of prizes, by M. Portalis, commissary of the government, in regard to the capture of the American ship *Statira*, the 25th July, 1799, agreeably to which a decree was pronounced the 26th July in the same year.

Principles of construction in cases where the orders are doubtful.

the articles inserted in treaties, relative to privateering, which have accumulated since the treaties of Munster, Pyrenees, and Oliva, we may determine from what period the practice of privateering became more extensive and universal. Each subsequent war has given rise to new orders or instructions, concerning privateers. Each belligerent has extended the encouragement given to privateers, and the complaints of neutrals have increased in proportion. The maritime wars that preceded the treaties of Aix-la-Chapelle, Fontainbleu, and Paris, sufficiently prove, that nothing had been done to diminish or prevent those complaints. Nor will this ever be the case, as long as the different powers are unwilling to agree on the principles of the laws of nations, which ought to constitute the basis of the instructions issued to privateers and ships of war.

8. In every case, when these regulations are not sufficiently clear, or when they contain provisions which admit of a double construction, we ought to consult former treaties, and conventions between sovereigns, since such agreements, as far as they may derogate from the ordinary laws, will have so much the greater weight. Thus, when these regulations and treaties, contradict each other, the latter ought to be adhered to, unless they have been annulled. If neither treaties nor laws afford a sufficient guide in the decision of some extraordinary cases, we must then conform to invariable and established maritime usages. Usages or established customs have the force of law, when they have

that it would be thought, for that reason, the interest of France to maintain it."(370)

10. Hostilities arise between nation and nation. Privateering by authorised armed vessels, makes a part of those hostilities, and is classed among the rights of war which the belligerent may use, and which he delegates to individuals on certain terms, and to be exercised according to rules prescribed to them; but piracy is actual robbery, that attacks, by stealth, navigation and commerce. Alexander asked a pirate, who had been brought before him, "what right he had to infest the seas?" "What right have you," replied he, with the boldness of a robber, "to ravage the earth? Because I have only a small vessel, I may, perhaps, be treated as a pirate, but you, who command a great army, will pass for a conqueror."(371)* But Alexander was a lawful sovereign, who made war at the head of his nation against other nations,

(370) Mably, *Droit public de l'Europe,* tom. 2, p. 417.

(371) *Cum quidam archipirata adductus est ad Alexandrum, rex eum interrogavit, cur mare infestaret? Cui ille: Cur tu, ô rex, orbem terrarum? Sed quia ego parva navi facio, pirata vocor; tu vero, quia magnis classibus, diceris imperator.* Stracca, *de Assecurationibus.* Glossa 20, n. 5. Cicero has expressed this trait with greater elegance, in the following passage: *Nam quum quæreretur ex eo, quo scelere compulsus mare haberet infesto uno myoparone. Eodem, inquit, quo tu orbem terræ.* Fragmenta, *de republica,* lib. 3.

* This anecdote will remind the reader of the very ingenious and impressive parallel between Alexander and Bagshot the highwayman, drawn by *Hawkesworth.* See *Adventurer,* Vol. II, n. 47....T.

Pirates, as enemies of the human race, may be punished any where.

and according to the rules of war; whereas the pirate was invested with no right, nor clothed with any public authority: the former fought to subdue nations on whom he had wrongs to avenge; the latter seized the vessels of every nation solely for the sake of plunder.(372)

11. Thus, as pirates are the enemies of the human race,(373) piracy is justly regarded as a crime against the universal laws of society, and is every where punished with death. As they form no national body, as they have no right to arm, nor make war, and, on account of the indiscriminate plunder of all vessels, are considered only as public robbers, every nation has a right to pursue and exterminate them without any previous declaration of war.(374) For these reasons it is lawful to arrest

(372) Valin, *Traité des Prises*, ch. 1 et 2. See also his *Commentary* on the Marine Ordinance of France, tit. *des Prises*.—Loccenius, *de Jure maritimo*, lib. 2, cap. 3, § 1.

(373) *Pirata non est perduellium numero definitus, sed communis hostis omnium.* Cicero, *de Officiis*, lib. 3. cap. 29.

(374) *Piratæ communes humani generis hostes sunt, quos idcirco omnibus nationibus persequi incumbit.* Bacon, *de Bello sacro*, p. 346. *Unde laudandus est mos eorum populorum, apud quos navigaturi instruuntur mandatis a publica potestate ad persequendos piratas, si quos in mari repererint: ut data occasione uti possint, non quasi ausu suopte, sed ut publice jussi.* Grotius, *de jure belli ac pacis*, lib. 2. cap. 20, § 14, et 8, n. 5. *Manet tamen vetus naturalis libertas primum in locis, ubi judicia sunt nulla ut in mari. Quo forte referri potest, quod Caius Cæsar privatus adhuc piratas, a quibus captus*

Pirates to be punished.—Owners of goods taken may always reclaim them.

them, in order that they may undergo the punishment merited by their crimes; but it is not lawful to strip them of their property, much less to put them to death, unless in the heat of battle. It is necessary to bring them before some court of justice.(375)

12. Pirates having no right to make conquests, cannot, therefore, acquire any lawful property in what they take; for the law of nations does not authorise them to deprive the true owner of his property, who always retains the right of reclaiming it wherever it may be found. Thus, by the principles of common law, as well as the law of nature, at whatever period, or in whatever manner, things taken by a pirate, may be recovered, they return again to their former owners, who lose none of their rights by such unjust usurpation.(376)*

fuerat classe tumultuaria persecutus est, ipsorumque naves partim fugavit, partim mersit: et cum proconsul negligeret animadvertere in captos piratas ipse eos in mare reversus cruce suffixit.

(375) *Salva tamen magistratus loci, jurisdictione criminali et instructione de modo persequendi piratas.* Loccenius, *de jure maritimo*, lib. 2, cap. 3. n. 2.

(376) Dig. lib. 41, tit. 3, l. 7, *de Usurpationibus.* Dig. lib. 49, tit. 15, l. l. 24 et 27, *de Captivis et postlimin. revers. Et quæ piratæ aut latrones nobis eripuerunt, non opus habent postliminio, ut Ulpianus et Javolenus responderunt; quia jus gentium illis non concessit, ut jus domínii mutare possint.....itaque res ab illis captæ ubicunque reperiuntur, vindicari possunt.* Grotius, *de jure belli ac pacis*, lib. 3, cap. 9, § 16. Loccenius, *de jure maritimo*, lib. 2, cap. 3, n. 4. The remarkable treaty of peace and commerce, made in 1265, between the ancient republic of Pisa, and Elmir de Momin,

Article in the treaty between France and the U. S. as to pirates.

13. From similar considerations of justice and equity, it has been stipulated, by the 26th article of the convention, made between the French Republic and the United States of America, the 30th September, 1800; "that the contracting parties will not receive any pirates into their ports, havens, or towns, nor permit any of their inhabitants to receive, protect, harbour, conceal, or assist them in any manner, but will bring to condign punishment all such inhabitants as shall be guilty of such acts or offences. All the vessels of pirates, with the goods or merchandise taken by, and brought into the port of either of the contracting parties, shall be seized as far as they can be discovered, and shall be restored to the owners, or their factors or agents, duly authorised by them; proper evidence being first given before competent judges for proving the property. Even if the effects shall have passed into other hands by sale, if it be proved, that the buyers knew, or had good reason to believe or suspect that they were piratically taken, they shall be restored."

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king of Tunis, may be here cited. The 30th article is agreeable to the principles above laid down, and is as follows: "And that the Pisans ought not to purchase any goods or slaves, which have been taken or carried off by the corsairs or Saracens of Africa and Bugea; and in case they shall do so, it shall be lawful to take them away, in order to bring them back to our territory, without being held to any indemnity." Tronci, *Annali di Pisa, ad ann.* 1264. See Dalborgo, *Diplom. Pis.* p. 217.

* See Brown's *Civil and Admiralty Law*, Vol. II. ch. xi. Woodeson's *Lectures on the Laws of England*, lect. 24, Vol. III, p. 421, 432,...T.

Opinions of writers as to the property retaken from pirates.

14. Some writers have thought it best to depart from the strictness of these maxims, with a view to the public good, and in order to encourage people to pursue pirates, and to snatch from their hands the property they have taken, against which the claims of justice never cease. They have, therefore, asserted, that things taken from pirates, might be lawfully possessed, though the first taking was unjust and illegal.(377) This opinion is founded on the principle that the public good ought to prevail over that of individuals, and on the difficulty the first owner would encounter in recovering his property. Besides, say they, the provisions of the common law, and the practice of most nations, even in regard to captures by pirates, adopt the rules generally in use, in deciding on the rights of the owners, in the case of recapture from any enemy within the twenty-four hours, whenever there is no law of the state to the contrary.(378)

15. This opinion has been adopted by some governments, who have made it a point in their legislative acts. England has declared, " that if any per-

(377) This is the opinion of Grotius, *de jure belli ac pacis*, lib. 3, cap. 9, § 17, adopted by Casaregis, in his 24th discourse, n. 4. Its object, says he, is to render Christians more ardent in the pursuit of pirates. D'Habreu, *de las Presas*, part. 2, cap. 6, § 4 et 6.

(378) Dig. lib. 41, tit. 1, l. 44, *de adquir. rer. dom.* Valin, on the 10th art. of the Ord. tit. *des Prises*. Roccus, *de navibus et naulo*, not. 37, n. 9. In this view of the subject, the admiralty of Marseilles pronounced the decree of the 22d October, 1678, and the parliament of Aix, its arret of the 10th June, 1710.

Law of England and Spain as to property retaken from pirates.

son shall commit piracy towards the subjects of any princes or republics, though at peace with England, and the goods are sold in *market overt*, they shall belong to the purchasers, and the owners be barred of their claims."(379)* The same spirit seems to have dictated the declaration of the king of Spain, of the 22d December, 1624. "Considering the great injury caused to my subjects and allies, by the great number of pirates that infest the seas, and being desirous to encourage privateers, and to recompense them for the expences incurred in the pursuit of these pirates, I order, that all effects recaptured from pirates, shall belong to those who retake them, in whatever place they may be taken, provided the vessels or effects recaptured have been twenty-four hours in the possession of the pirates."†

(379) Extracted from the laws and statutes of England, art. 8, to be found at the end of the *History of English Pirates*, by Charles Johnson, translated into French. This work, which is very scarce, was printed at Paris, in 1726, by Ganau, in one volume 12mo.

* This is the exception, not the rule. The general rule in England has always been, that goods taken by pirates, as well as goods stolen on land, remained the property of the original owner, in whom they again vest on the conviction of the offender, unless they have been sold in *market overt*. This exception of sales of stolen goods in *market overt*, is peculiar to England, and was made for the convenience and security of public trade and commerce. Abbot's *Law of Ships and Seamen*, p. 9. Woodeson's *Lectures, &c.* lect. 34, Vol. III, p. 430. Year Book, 2 Rich. 3. 2. 27 Edw. 3, stat. 2, c. 13. Jenkins Centuries, 165, Godb. 193, 3 Bulst. 29.—1 Cro. 685....T.

† But Grotius thinks that this law cannot hinder foreigners from challenging their own property. Grotius, loc. cit. lib. 3, cap. 9, § 17....T.

As pirates can never acquire, they cannot transfer a right to property.

16. If it be true, as has been shewn, that pirates never acquire any right in things taken by them, it is certain, that they can never transfer any right to a purchaser, in whatever way the property may pass into the hands of a third person, whether by sale in a *market overt*, according to the English law, or after twenty-four hours possession by the pirates, according to the law of Spain, since neither of these modes of transfer can make good the title of the pirates to the things taken. Besides, if these rules have been adopted for no other purpose but to encourage privateers, the sale of the property in a *market overt*, or the twenty-four hours possession, is of little moment, since pirates being usurpers and robbers, no solemnity of transfer, no term of time, no prescription, can give them the right of property in the things seized or stolen. We must conclude, therefore, either that things retaken from pirates, do not become the property of the recaptors, or, if they ought to be adjudged to them, that the solemn sale, and the twenty-four hours possession, amount to nothing.

17. The marine ordinance of France, of 1681, confirmed by another ordinance of the king on this subject, the 5th September, 1718, appears to me, more agreeable to system, if not more conformable to the opinions of the authors who have been cited. It is, besides, much more honorable to the nation, since it supposes in Frenchmen, a generous disposition to pursue pirates, excited less by interest or the hope of gain, than a love of glory, and an attachment to public good. The 10th article of the ordinance,

title, *des Prises*, is as follows: "The vessels and effects of our subjects and allies, retaken from pirates, and reclaimed within a year and a day, after proclamation for that purpose made at the admiralty, shall be restored to the owners, on their paying one-third of the value of the vessel and goods, for the expence of recapture."(380) By this generous and wise regulation on the subject; it is of little moment, that the goods have been purchased at a solemn sale, or that they have been twenty-four hours in the hands of pirates, since the right of reclaiming them, in France, still exists in the true owner, during a year and a day subsequent to public notice given to that effect. Thus, after the year and a day, there will be complete limitation or bar of the former owner's right, if he has failed to put in his claim within that time.

18. The same wisdom and equity, which distinguish the laws of France on this subject, are to be found in the edict of the king of Sardinia, of the 15th July, 1750, which, in the 63d and 64th paragraphs, contains the following provisions: "We declare, in the first place, that pirates can have no right of action

(380) This provision is agreeable to the principles of equity and common law, which direct that effects unjustly carried off by pirates, should be restored to the original owner, on his paying the necessary expences incurred in their recovery. *Ei tamen qui suo sumptu possessionem rei alienæ adeptus est, tantum ex naturali æquitate est repetendum quantum dominus ipse ad rem recuperandam libenter impensiturus erat.* Loccenius, *de jure maritimo*, lib. 2, cap. 3, § 8.

against each other, as to effects taken by them, at any period of time, or in any place, not even as to goods taken by one pirate from another pirate, and much less if the captor does not practice piracy; but that even humanity and justice, which always require that we should save effects shipwrecked, are of no avail in favour of pirates; so that restitution can be made to those only to whom the effects belonged before they became the prey of pirates. For the right of property is not destroyed by the capture, nor by prescription, supposing that they have passed from the hands of the pirate to a third person; in this case only the owners must reimburse the sum paid by the purchaser, if he did not know that he was buying the booty of pirates, or if he had no other means of recovering them. . . . . But, to encourage all those who are willing at their own risk and expence to recover property taken by pirates, our pleasure is, that they shall be entitled to one-third of the effects retaken; and even to the whole, if within a year and a day from the date of the notification, made by the secretary of the consulate, as directed in other cases, the owners shall not put in their claim. If any difficulty shall arise as to the proofs of the claimants, their oath, with the concurrence of probable proofs, shall be sufficient to entitle them to judgment in their favour."

Conclusion of the work.

CONCLUSION.

ARRIVED at the end of the course that I had marked out, I stop, and here terminate my labours. I am sensible that I have not said every thing that I had conceived on a subject so vast, and so important to the happiness of nations. Yet I flatter myself, that the main object I had in view, has been attained; that of laying the foundations of a science, on which some more skilful hand may, hereafter, raise a more spacious edifice. Happy if the useful truths displayed in this work, should contribute to the welfare of mankind:—more happy still, if its perusal should impress on the hearts of the potentates of Europe, the great idea, that MARITIME LAW is not the result of barren theory, or cold diplomatic speculation, but an emanation of the luminous and sacred principles of the law of nature and nations; and that the practice of this law, rendered common among all nations, and essential to the interest of all, is, perhaps, the only secret, or the noblest and most effectual means, of securing the repose of the world.

END OF THE SECOND AND LAST PART.

APPENDIX.

☞ *INSTEAD of the* Catalogue of Books and Authors *cited by M. Azuni, and annexed to the second volume of the original work, it has been thought more useful to subjoin, as an* Appendix *to this translation, some public acts and papers relative to neutral commerce.*

An ample list of treaties and public acts, from 1731 *to* 1802, *with a reference to the different* collections *in which they may be found, is inserted at the end of Mr. Cobbett's translation of the* Compendium of the Law of Nations, *by M. Martens, London,* 1802. *The* introduction *to this work contains a list of the most approved works necessary in the study of the law of nations; and the* sixth *chapter of the third book exhibits* a summary of the rights and duties of neutrality, according to the modern law of Europe. *In the second part of the work of* Lampredi, *translated by* M. Peuchet, *Paris,* 1802, *may be found numerous* extracts *from the public treaties and conventions relative to commerce and navigation.*

Besides the authors referred to in the notes to the preceding work, some small but valuable tracts on the rights of neutrals, *have lately appeared in Europe and America, that deserve to be mentioned. These are,* 1. *A treatise on the Visitation of Neutral Vessels under Convoy, &c. by* I. F. W. Schlegel, *Doctor and Professor of Law in the University of Copenhagen, translated, London,* 1801;

2. *Remarks on Mr. Schlegel's work, by* Alexander Croke, *Esq. L. L. D. London,* 1801; 3. *Letters of Sulpicius on the Northern Confederacy, with appendix, &c. London,* 1801; 4. *A Vindication of the Convention, concluded between Great-Britain and Russia, London,* 1801; 5. *Substance of the Speech of the Right Hon. Lord Grenville in the House of Lords, November* 13, 1801, *London,* 1802; 6. *The Rights of Neutrals, &c. Miscellaneous Papers on Political and Commercial subjects, by* Noah Webster, junior, *New-York,* 1802; 7. *A Dissertation on the Freedom of Navigation and Maritime Commerce, &c. by* William Barton, *A. M. Philadelphia,* 1802; 8. *War in Disguise, or the Frauds of the Neutral Flags, London,* 1805, *reprinted, New-York,* 1806; 9. *An Answer to War in Disguise, or, Remarks upon the New Doctrine of England concerning Neutral Trade, New-York, February,* 1806; 10. *An Examination of the British Doctrine, which subjects to capture a neutral trade, not open in time of peace, Washington,* 1806.

TRANSLATOR.

APPENDIX.

NUMBER I.

Declaration of the Empress of Russia, to the Courts of London, Versailles, and Madrid, dated February 26, 1780.

THE empress of all the Russias has fully manifested her sentiments of equity and moderation, as well as given evident proof, during the course of the war that she supported against the Ottoman Porte, of the regard she has for the rights of neutrality and the liberty of universal commerce, as all Europe can witness. This conduct, as well as the principles of impartiality that she has displayed during the present war, justly inspired her with the fullest confidence, that her subjects would peaceably enjoy the fruits of their industry, and the advantages belonging to a neutral nation. Experience has, nevertheless, proved the contrary. Neither the abovementioned considerations, nor a regard to the rights of nations, have prevented the subjects of her imperial majesty from being often molested in their navigation, and stopped in their operations, by those of the belligerent powers.

These hindrances to the liberty of trade in general, and to that of Russia in particular, are of a nature to

excite the attention of all neutral nations. The empress finds herself obliged, therefore, to free it, by all the means compatible with her dignity and the well-being of her subjects: but, before she puts this in execution, and with a sincere intention to prevent any future infringements, she thought it but just to publish to all Europe the principles she means to follow, which are the most proper to prevent any misunderstanding, or any occurrences that may occasion it. Her imperial majesty does it with the more confidence, as she finds these principles coincident with the primitive right of nations, which every people may reclaim, and which the belligerent powers cannot invalidate without violating the laws of neutrality, and without disowning the maxims they have adopted in their different treaties and public engagements.

They are reducible to the following points:

1st, That all neutral ships may freely navigate from port to port, and on the coasts of nations at war.

2dly, That the effects belonging to the subjects of the said warring powers, shall be free in all neutral vessels, except contraband merchandise.

3dly, That the empress, as to the specification of the abovementioned merchandise, holds to what is mentioned in the tenth and eleventh articles of her treaty of commerce with Great-Britain, extending her obligations to all the powers at war.

4thly, That, to determine what is meant by a blockaded port, this is only to be understood of one which is so well kept in, by the ships of the power that attacks it, and which keep their places, that it is dangerous to enter into it.

5thly, That these principles serve as a rule for proceedings and judgments upon the legality of prizes.

Her imperial majesty, in making these points public, does not hesitate to declare, that, to maintain them, and to protect the honor of her flag, the security of the trade and navigation of her subjects, she has prepared the greatest part of her maritime forces. This measure will not, however, influence the strict neutrality she does observe, and will observe, so long as she is not provoked and forced to break the bounds of moderation and perfect impartiality. It will be only in this extremity, that her fleet have orders to go wherever honor, interest, and need may require.

In giving this solemn assurance with the usual openness of her character, the empress cannot do other than promise herself, that the belligerent powers, convinced of the sentiments of justice and equity which animate her, will contribute towards the accomplishment of these salutary purposes, which manifestly tend to the good of all nations, and to the advantage even of those at war. In consequence of which, her imperial majesty will furnish her commanding officers with instructions, conformable to the abovementioned principles, founded upon the *primitive laws of nations, and so often adopted in their conventions.*

(Dodsley's Annual Register for 1780, *p.* 347.*)*

No. II.

The Memorial presented to their high mightinesses by Prince Gallitzin, the Russian minister, on the part of the empress his sovereign.

High and Mighty Lords,

THE underwritten, envoy extraordinary from the empress of all the Russias, has the honor to communicate to you a copy of the declaration which the empress, his sovereign, has made to the belligerent powers. Your high mightinesses may look upon this communication as a particular mark of the attention of the empress for the republic, which is equally interested in the reasons which occasioned the declaration. He has further orders to declare to your high mightinesses, in the name of her imperial majesty, that how desirous soever she may be on the one hand to maintain the strictest neutrality during the present war, yet her majesty is as determined to take the most efficacious means to support the honor of the Russian flag, the security of the trade, and the navigation of her subjects, and not suffer either to be hurt by any of the belligerent powers; that, in order to prevent, on this occasion, any misunderstanding or false interpretation, she thought it necessary to specify in the declaration the limits of a free trade, and what is called contraband. That the definition of the former is founded upon the clearest notions of natural right, and the latter is literally taken from the treaty of commerce between Russia and Great-Britain, by which her imperial majesty means incontestibly to prove her good faith and impartiality towards each party; that she consequently appre-

hends, that the other trading powers will immediately come into her way of thinking relative to neutrality.

From these considerations, her imperial majesty has ordered the underwritten to invite your high mightinesses to make a common cause with her, as such an union may serve to protect the trade and navigation, and at the same time observe a strict neutrality, and to communicate to your high mightinesses the regulation she has in consequence taken.

The same invitation has been made to the courts of Copenhagen, Stockholm, and Lisbon, in order that by the united endeavours of all the neutral maritime powers, a neutral system, founded on justice, might be established and legalised in favour of the trade of neutral nations, which, by its real advantages, might serve for a rule for future ages.

The underwritten does not doubt but your high mightinesses will, without delay, take the invitation of her imperial majesty into consideration, and concur in immediately making a declaration to the belligerent powers, founded on the same principles as that of the empress, explaining, at the same time, the nature of a free and contraband trade, conformable to their respective treaties with the other nations.

For the rest, the underwritten has the honor to assure your high mightinesses, that if, to establish such a glorious and advantageous system upon the the most solid basis, they wished to open a negociation with the abovementioned neutral powers on this subject, the empress, his sovereign, is ready to join you.

Your high mightinesses will easily see the necessity of accelerating your resolutions upon objects of such importance and advantage for humanity in general. The underwritten begs of you to give him a speedy answer. DEMETRI PRINCE GALLITZIN.

Hague, April 3, 1780.

(An. Reg. 1780, *p.* 346.)

No. III.

Answer from the king of Spain, to the declaration of the empress of Russia.

THE king, being informed of the empress's sentiments with respect to the belligerent and neutral powers, by a memorial remitted to Comte de Florida Blanca, on the 15th inst. by Mr. Etienne de Zinowief, minister of her imperial majesty: the king considers this as the effect of a just confidence, which his majesty has on his part merited; and it is yet more agreeable that the principles adopted by this sovereign should be the same as have always guided the king, and which his majesty has for a long time, but without success, endeavoured to cause England to observe, while Spain remained neuter. These principles are founded in justice, equity and moderation; and these same principles Russia and all the other powers have experienced in the resolutions formed by his majesty; and it has been entirely owing to the conduct of the English navy, both in the last and the present war, (a conduct wholly subversive of the received rules among neutral powers,) that his majesty has been obliged to follow their ex-

ample; since the English paying no respect to a neutral flag, if the same be laden with effects belonging to the enemy, even if the articles should not be contraband, and that flag not using any means of defending itself, there could not be any just cause why Spain should not make reprisals, to indemnify herself for the great disadvantages she must otherwise labour under. The neutral powers have also laid themselves open to the inconveniences they have suffered, by furnishing themselves with double papers, and other artifices, to prevent the capture of their vessels; from which have followed captures and detentions innumerable, and other disagreeable consequences, though in reality not so prejudicial as pretended; on the contrary, some of these detentions have turned to the advantage of the proprietors, as the goods, being sold in the port where they were condemned, have frequently gone off at a higher price than they would have done at the place of their destination.

The king, nevertheless, not contented with these proofs of his justification, which have been manifested to all Europe, will this day have the glory of being the first to give the example of respecting the neutral flag of all the courts that have consented, or shall consent, to defend it till his majesty finds what part the English navy takes, and whether they will, together with their privateers, keep within proper bounds. And to shew to all the neutral powers how much Spain is desirous of observing the same rules in time of war as she was directed by whilst neuter, his majesty conforms to the other points contained in the declaration of Russia. To be under-

stood, nevertheless, that, with regard to the blockade of Gibraltar, the danger of entering subsists, as determined by the fourth article of the said declaration. These dangers may, however, be avoided by the neutral powers, if they conform to those rules of precaution established by his majesty's declaration of the 13th of last March, which has been communicated to the court of Petersburg by his minister.

FLORIDA BLANCA.

Aranjuez, April 18, 1780.

(An. Reg. 1780, *p.* 350.*)*

No. IV.

Answer from the court of Great-Britain to the declaration of the empress of Russia: sent to the British envoy at St. Petersburg, April 23d, 1780.

DURING the course of the war, wherein his Britannic majesty finds himself engaged through the unprovoked aggressions of France and Spain, he hath constantly manifested his sentiments of justice, equity, and moderation, in every part of his conduct. His majesty hath acted towards friendly and neutral powers, according to their own procedure respecting Great-Britain, and conformable to the clearest principles generally acknowledged as the law of nations, being the only law between powers where no treaties subsist, and agreeable to the tenor of his different engagements with other powers, those *engagements* have *altered* this *primitive law*, by mutual stipulations, proportioned to the will and convenience of the contracting parties.

Strongly attached to her majesty of all the Russias, by the ties of reciprocal friendship and common interest, the king, from the commencement of those troubles, gave the most precise orders respecting the flag of her imperial majesty, and the commerce of her subjects, agreeable to the law of nations, and the tenor of the engagements stipulated by his treaty of commerce with her, and to which he shall adhere with the most scrupulous exactness.

The orders to this intent have been renewed, and the utmost care will be taken for their strictest execution.

It may be presumed, not the least irregularity will happen; but in case any infringements, contrary to these repeated orders, take place, the courts of admiralty, which in this, like all other countries, are established to take cognisance of such matters, and *in all cases do judge solely by the law of nations, and by the specific stipulations of different treaties,* will redress every hardship in so equitable a manner, that her imperial majesty shall be perfectly satisfied, and acknowledge a like spirit of justice, which she herself possesses. *(An. Reg.* 1780, *p.* 349.*)*

No. V.

Answer from the king of France to the declaration of the empress of Russia.

THE war in which the king is engaged, having no other object than the attachment of his majesty to the freedom of the seas, he could not, but with the truest satisfaction, see the empress of Russia

adopt the same principle, and resolve to maintain it. That which her imperial majesty claims from the belligerent powers, is no other than the rules already prescribed to the French marine, the execution of which is maintained with an exactitude known and applauded by all Europe.

The liberty of neutral vessels, restrained only in a few cases, is the direct consequence of neutral right, the safeguard of all nations, and the relief even of those at war. The king has been desirous, not only to procure a freedom of navigation to the subjects of the empress of Russia, but to those of all the states who hold their neutrality, and that upon the same conditions as are announced in the treaty to which his majesty this day answers.

His majesty thought he had taken a great step for the general good, and prepared a glorious epocha for his reign, by fixing, by his example, the rights which every belligerent power may, and ought to acknowledge, to be due to neutral vessels. His hopes have not been deceived, as the empress, in avowing the strictest neutrality, has declared in favour of a system which the king is supporting at the price of his people's blood, and that her majesty adopts the same rights as he would wish to make the basis of the maritime code.

If fresh orders were necessary to prevent the vessels of her imperial majesty from being disturbed in their navigation by the subjects of the king, his majesty would immediately give them; but the empress will no doubt be satisfied with the dispositions made by his majesty in the regulations he has published. They do not rest on circumstanecs only, but they

are founded on the rights of nations, and quite suitable to a prince who finds the happiness of his own kingdom in that of general prosperity. The king wishes her imperial majesty would add, to the means she has fixed to determine what merchandises are reckoned *contraband* in time of war, precise rules in the form of the sea-papers, with which the Russian ships will be furnished.

With this precaution, his majesty is assured nothing will happen to make him regret the having put the Russian navigators on as advantageous a footing as can be in time of war. Happy circumstances have more than once occurred to prove to the courts how important it is for them to explain themselves freely relative to their respective interests.

His majesty is very happy to have explained his way of thinking to her imperial majesty, upon so interesting a point for Russia, and the trading powers of Europe. He the more sincerely applauds the principles and views of the empress, as his majesty partakes of the same sentiments which have brought her majesty to adopt those measures which must be to the advantage of her own subjects, and all other nations.

Versailles, April 25th, 1780.

(*An. Reg.* 1780, *p.* 349.)

No. VI.

The Maritime Treaty (known by the name of the Treaty of armed Neutrality.)

ART. I. THEIR respective majesties are fully and sincerely determined to keep upon the most friendly terms with the present belligerent powers, and preserve the most exact neutrality: they solemnly declare their firm intention to be, that their respective subjects shall strictly observe the laws forbidding all contraband trade with the powers now being, or that may hereafter be, concerned in the present disputes.

II. To prevent all equivocation or misunderstanding of the word *contraband*, their imperial and royal majesties declare, that the meaning of the said word is solely restrained to such goods and commodities, as are mentioned under that denomination, in the treaties subsisting between their said majesties and either of the belligerent powers. Her imperial majesty abiding principally by the 10th and 11th articles of the treaty of commerce with Great-Britain; the conditions therein mentioned, which are founded on the rights of nations, being understood to extend to the kings of France and Spain; as there is at present no specific treaty of commerce between the two latter and the former. His Danish majesty, on his part, regulates his conduct in this particular, by the first article of his treaty with England, and the 26th and 27th of that subsisting between his said majesty and the king of France, extending the provisions made in the latter to the Catholic king; there being no treaty *ad hoc*, between Denmark and Spain.

III. And whereas, by this means, the word *contraband*, conformable to the treaties now extant, and the stipulations made between the contracting powers, and those that are now at war, is fully explained; especially by the treaty between Russia and England, of the 20th of June, 1766; between the latter and Denmark, of the 11th of July, 1670; and between their Danish and most christian majesties, of August 23d, 1742; the will and opinion of the high contracting powers are, that all other trade whatever shall be deemed, and remain free and unrestrained.

By the declaration delivered to the belligerent powers, their contracting majesties have already challenged the privileges founded on natural right, whence spring the freedom of trade and navigation, as well as the right of neutral powers; and being fully determined not to depend in future merely on an arbitrary interpretation, devised to answer some private advantages or concerns, they mutually covenanted as followeth:

1st. That it will be lawful for any ship whatever, to sail freely from one port to another, or along the coasts of the powers now at war.

2d. That all merchandise and effects, belonging to the subjects of the said belligerent powers, and shipped on neutral bottoms, shall be entirely free, except contraband goods.

3d. In order to ascertain what constitutes the blockade of any place or port, it is to be understood, to be in such predicament, when the assailing power has taken such a station, as to expose to imminent danger, any ship or ships that would attempt to sail in or out of the said ports.

4th. No neutral ship shall be stopped, without a material and well-grounded cause; and in such cases, justice shall be done to them, without loss of time; and besides indemnifying, each and every time, the party aggrieved and thus stopped without sufficient cause, full satisfaction shall be given to the high contracting powers, for the insult offered to their flag.

IV. In order to protect officially the general trade of their respective subjects, on the fundamental principles aforesaid, her imperial and his royal majesty have thought proper, for effecting such purpose, each respectively to fit out a proportionate rate of ships of war and frigates. The squadron of each of the contracting powers shall be employed in escorting convoys, according to the particular circumstances of the navigators and traders of each nation.

V. Should any of the merchantmen belonging to the subjects of the contracting powers, sail in a latitude where there shall be no ships of war of their own nation, and thus be deprived of their protection; in such case, the commander of the squadron belonging to the other friendly power shall, at the request of said merchantmen, grant them sincerely, and *bona fide*, all necessary assistance. The ships of war and frigates, of either of the contracting powers, shall thus protect and assist the merchantmen of the other: provided nevertheless, that, under the sanction of such required assistance and protection, no contraband be carried on, nor any prohibited trade, contrary to the laws of neutrality.

VI. The present convention cannot be supposed to have any relative effect; that is, to extend to the differences they may have arisen since its being con-

cluded: unless the controversy should spring from continual vexations, which might tend to aggrieve and oppress all the European nations.

VII. If, notwithstanding the cautious and friendly care of the contracting powers, and their steady adherence to an exact neutrality, the Russian and Danish merchantmen should happen to be insulted, plundered, or captured by any of the armed ships or privateers, belonging to any of the belligerent powers: in such case, the ambassador or envoy of the aggrieved party, to the offending court, shall claim such ship or ships, insisting on a proper satisfaction—and never neglect to obtain a reparation for the insult offered to the flag of his court. The minister of the other contracting power, shall, at the same time, in the most efficacious and vigorous manner, defend such requisitions, which shall be supported by both parties with unanimity. But in case of any refusal, or even delay in redressing the grievances complained of, then their majesties will retaliate against the power that shall thus refuse to do them justice, and immediately agree together on the most proper means of making well-founded reprisals.

VIII. In case either of the contracting powers, or both at the same time, should be in any manner aggrieved or attacked, in consequence of the present convention, or for any reason relating thereto, it is agreed, that both powers will join, act in concert for their mutual defence, and unite their forces, in order to procure to themselves an adequate and perfect satisfaction, both in regard to the insult put upon their respective flags, and the losses suffered by their subjects.

IX. This convention shall remain in force for and during the continuance of the present war; and the obligation enforced thereby, will serve as the groundwork of all treaties that may be set on foot hereafter: according to future occurrences, and on the breaking out of any fresh maritime wars which might unluckily disturb the tranquillity of Europe. Meanwhile, all that is hereby agreed upon, shall be deemed as binding and permanent, in regard both to mercantile and naval affairs; and shall have the force of law, in determining the rights of neutral nations.

X. The chief aim, and principal object of the present convention, being to secure the freedom of trade and navigation, the high contracting powers have antecedently agreed, and do engage to give to all other neutral powers, free leave to accede to the present treaty, and, after a thorough knowledge of the principles on which it rests, share equally in the obligations and advantages thereof.

XI. In order that the powers, now at war, may not be ignorant of the strength and nature of the engagements entered into by the two courts aforesaid, the high contracting parties shall give notice, in the most friendly manner, to the belligerent powers, of the measures by them taken, by which, far from meaning any manner of hostility, or causing any loss or injury to other powers, their only intention is to protect the trade and navigation of their respective subjects.

XII. This convention shall be ratified by the contracting powers, and the ratifications interchanged between the parties in due form, within the space of six weeks, from the day of its being signed, or even

sooner, if possible. In witness whereof, and by virtue of the full powers granted us for the purpose, we have put our hands and seals to the present treaty.

Given at Copenhagen, July 19, 1780.

CHARLES D'OSTEN, called SOKEN,
J. SCHACK RATLAU,
A. P. COMPTE BERNSTORFF,
O. THOFT,
H. EIKSTEDT.

Acceded to, and signed by the plenipotentiaries of the court of Sweden, at St. Petersburg, 21st of July, 1780; and by the states-general accepted, November 20, 1780; and signed at St. Petersburg, January 5, 1781, with the addition only of article —

XIII. If the respective squadrons, or ships of war, should meet or unite, to act in conjunction, the command in chief will be regulated according to what is commonly practised between the crowned heads and the republic. *(An. Reg.* 1781, *p.* 300.*)*

No. VII.

Declaration of the king of Denmark and Norway, to the courts of London, Versailles, and Madrid.

IF the most exact and perfect neutrality, with the most regular navigation, and the most inviolable respect to treaties, could have kept free the commerce of the subjects of the king of Denmark and Norway, from the inroads of the powers with whom he is at peace, free and independent, it would not be necessary to take measures to insure to his subjects that liberty to which they have the most incontrovertible

right. The king of Denmark has always founded his glory, and grandeur, upon the esteem and confidence of the people. It has been his rule, from the beginning of his reign, to testify to all the powers, his friends, a conduct the most capable of convincing them of his pacific intentions, and of his desire to contribute to the general happiness of Europe. His proceedings have always been conformable to these principles, against which nothing can be alleged; he has not, till now, addressed himself, but to the powers at war, to obtain a redress of his grievances; and he has never wanted moderation in his demands, nor acknowledgments when they have received the success they deserved: but the neutral navigation has been too often molested, and the most innocent commerce of his subjects too frequently troubled; so that the king finds himself obliged to take proper measures to assure to himself and his allies, the safety of commerce and navigation, and the maintenance of the inseparable rights of liberty and independence. If the duties of neutrality are sacred, the law of nations has also its rights avowed by all impartial powers, established by custom, and founded upon equity and reason. A nation independent and neuter, does not lose by the wars of others the rights which she had before the war, because peace exists between her and all the belligerent powers. Without receiving or being obliged to follow the laws of either of them, she is allowed to follow, in all cases (contraband excepted) the traffic which she would have a right to do, if peace existed with all Europe, as it exists with her. The king pretends to nothing beyond what the neutrality allows him. This is his rule, and that of his

people; and the king cannot accord to the principle, that a power at war has a right to interrupt the commerce of his subjects. He thinks it due to himself and his subjects, faithful observers of these rules, and to the powers at war themselves, to declare to them the following principles, which he has always held, and which he will always avow and maintain, in concert with the empress of all the Russias, whose sentiments he finds entirely conformable with his own.

1st. That neutral vessels have a right to navigate freely from port to port, even on the coasts of the powers at war.

2d. That the effects of the subjects of the powers at war shall be free in neutral vessels, except such as are deemed contraband.

3d. That nothing is to be understood under the denomination of contraband, that is not expressly mentioned as such in the third article of this treaty of commerce with Great-Britain, in the year 1670, and the 26th and 27th articles of his treaty of commerce with France, in the year 1742; and the king will equally maintain these rules with those powers with whom he has no treaty.

4th. That he will look upon that as a port blocked up, into which no vessel can enter without evident danger, on account of vessels of war stationed there; which form an effectual blockade.

5th. That these principles serve for rules in procedure, and that justice shall be expeditiously rendered, after the rules of the sea, conformably to treaty and usage received.

6th. His majesty does not hesitate to declare, that he will maintain these principles with the honor of

his flag, and the liberty and independence of the commerce and navigation of his subjects; and that it is for this purpose he has armed a part of his navy, although he is desirous to preserve, with all the powers at war, not only a good understanding, but all the friendship which the neutrality can admit of. The king will never recede from these principles, unless he is forced to it: he knows the duties and the obligations, he respects them as he does his treaties, and desires no other than to maintain them. His majesty is persuaded, that the belligerent powers will acknowledge the justice of his motives; that they will be as averse as himself to doing any thing that may oppress the liberties of mankind, and that they will give their orders to their admiralty and to their officers, conformably to the principles above restricted, which tend to the general happiness and interest of all Europe.

Copenhagen, July 28, 1780.

(An. Reg. for 1780, *p.* 352.*)*

No. VIII.

Declaration of the king of Sweden to the same courts.

EVER since the beginning of the present war, the king has taken particular care to manifest his intentions to all Europe. He imposed upon himself the law of a perfect neutrality; he fulfilled all the duties thereof with the most scrupulous exactitude; and in consequence thereof, he thought himself entitled to all the prerogatives naturally appertaining to the qualification of a sovereign perfectly neuter. But notwithstanding this, his commercial subjects have

been obliged to claim his protection, and his majesty has found himself under the necessity to grant it to them.

To effect this, the king ordered last year a certain number of men of war to be fitted out. He employed a part thereof on the coasts of his kingdom, and the rest served as convoys for the Swedish merchant-ships in the different seas which the commerce of his subjects required them to navigate. He acquainted the several belligerent powers with these measures, and was preparing to continue the same during the course of this year, when other courts, who had likewise adopted a perfect neutrality, communicated their sentiments unto him, which the king found entirely conformable to his own, and tending to the same object.

The empress of Russia caused a declaration to be delivered to the courts of London, Versailles, and Madrid, in which she acquainted them of her resolution to protect the commerce of her subjects, and to defend the universal rights and prerogatives of neutral nations. This declaration was founded upon such just principles of the law of nations, and the subsisting treaties, that it was impossible to call them into question. The king found them entirely concordant with his own cause, and with the treaty concluded in the year 1666, between Sweden and France; and his majesty could not forbear to acknowledge and to adopt the same principles, not only with regard to those powers, with whom the said treaties are in force, but also with regard to such others as are already engaged in the present

war, or may be involved therein hereafter, and with whom the king has no treaties to reclaim. It is the universal law, and when there are no particular engagements existing, it becomes obligatory upon all nations.

In consequence thereof, the king declares hereby again, "That he will observe the same neutrality, and with the same exactitude as he has hitherto done. He will enjoin all his subjects, under severe penalties, not to act in any manner whatever contrary to the duties which a strict neutrality imposes on them; but he will effectually protect their lawful commerce, by all possible means, whenever they carry on the same, conformably to the principles here above mentioned."

(An. Reg. 1780, *p.* 353.*)*

No. IX.

Ordinance and declaration of the king of Prussia, concerning the navigation and maritime commerce of his subjects; made in consequence of the armed neutrality.

Frederic R.

EVER since the beginning of the present maritime war, which has since spread over almost all the southern parts of Europe, the king has been particularly attentive to procure to all his subjects, who traffic by sea or practise navigation, all the security they were entitled to. To this end, his majesty has, by means of his ministers, requested of the belligerent powers, that they would give strict and pre-

cise orders to all commanders of their ships of war and privateers, to respect the Prussian flag, and to let all Prussian ships, laden with goods and merchandises, which according to the law of nations are lawful, and not contraband, free and peaceably pass and repass, without causing them the least damage or delay; and much less to conduct them, without any right or necessity, into any foreign ports. To this request, the said powers have not only returned the most satisfactory answers, but have also given the most friendly assurances that it should be complied with in every respect.

To obtain this end, with still more certainty, his majesty has commanded all his ministers, residing at the courts of the belligerent powers, to interest themselves in the most efficacious manner, and by the most energetic representations, in favor of the Prussian subjects trading by sea, whose ships may have been taken, and conducted into any foreign port, or, as it has often happened, pillaged and robbed in the open sea; and to insist that they be speedily released, that all law-suits, which their capture may occasion, be decided with impartiality and without loss of time.

In order, therefore, to second these beneficial views of his majesty, and to enable the king's ministers to acquit themselves of these his royal orders in that respect, it is necessary that the subjects of his majesty, who may find themselves in that case, should either apply personally, or by means of a commissioner, to the king's minister at the court where complaint is to be exhibited, and that they should give him a true and circumstantial account of

the subject of their complaint, in order that he may exhibit and support the same, where and when he shall see cause. They are, however, not to rely entirely and only on the intercession of the said minister, but they are likewise to exhibit their complaints, either by themselves or by their commissioners, before the admiralties or maritime courts of the country where their ships may have been conducted, or wherein they may have sustained any damage; to support these complaints with the necessary proofs; to conform to the judiciary forms established in each country; and to plead and pursue their causes with all possible diligence, by means of their attornies, or other persons properly qualified. By these means, his majesty flatters himself, that they will obtain a prompt and impartial decision; but if the contrary should be the case, they shall then apply to the king's envoys, for them to lay before each court such complaints as the case may require, and to obtain due satisfaction.

But in order to secure the more effectually, for the future, the navigation of his subjects from all insults, the king has, by his minister, requested her majesty the empress of Russia, and the two other maritime powers, who, as it is well known, have joined in a convention for maintaining the maritime neutrality, that they would be pleased, as powers with whom the king has the satisfaction to live in perfect harmony and friendship, to give orders to all commanders of their ships of war, to take the Prussian merchant-ships, which they may meet with at sea, within sight, and within reach of their cannon, under protection and convoy, and to assist and defend

them, in all cases where they shall be attacked, or any ways molested by the ships of war or privateers of the belligerent powers.

Her majesty, the empress of Russia, has assured the king, by a written declaration from her ministry, that she has not only caused the most precise orders to be given to all commanders of her ships of war, that they shall protect, against all attacks and molestations whatever, the ships of the Prussian merchants and navigators, which they may meet with, either at sea, or in any port, as belonging to a power allied with Russia, and which shall scrupulously observe the rules of maritime neutrality, as founded on the law of nations; but that she would likewise enjoin all her ministers at the courts of the belligerent powers, that whenever the Prussian envoys may have any complaint to exhibit at the court where they reside, concerning any hindrance or vexation caused to the maritime commerce of Prussian subjects, that shall support the same, in the name of her imperial majesty, with all the good offices, influence, and assistance in their power; and that in return to this, her imperial majesty expects, that his majesty the king of Prussia, would also furnish his ministers, residing at the courts of the belligerent powers, with instructions conformable to the convention of the northern maritime powers, with orders to support, likewise, by the most energetic representations, all the complaints of the ministers of the allied powers for the defence of maritime neutrality, in all cases where they may have any satisfaction to demand for the subjects of their sovereigns.

The king has accepted this amicable declaration of her imperial majesty with great pleasure and gratitude; and by a counter declaration, every way conformable to the above, has signified his willingness to comply with the views of her imperial majesty, and in consequence thereof has caused the necessary instructions to be given to his ministers residing at the different courts.

Already before this, his majesty had, on the occasion of another negociation with the court of Denmark, requesting his Danish majesty to grant the protection of his naval forces to the Prussian merchant-ships, from whom his majesty had likewise received the friendly assurance, that the Danish ships of war should take under their protection and convoy all such Prussian ships as should conform to the treaties subsisting between the court of Denmark and the belligerent powers, with regard to contraband commodities. The king has caused the same request to be made to the court of Sweden, and he flatters himself with an answer from his Swedish majesty, equally favorable as those from their majesties the empress of Russia and the king of Denmark.

His majesty, therefore, thinks proper to acquaint all his subjects, who traffic by sea, or practise navigation, and all others whom it may concern, with the above arrangements, in order that they, or the captains and commanders of their ships, may conform thereto; and that in case they should be attacked, molested, or taken by the ships of war, or privateers of the belligerent nations, that they may apply to the Russian, Danish, or Swedish ships of war, that may be within their reach, to demand their

protection and assistance, and that they may join, as much as possible, the fleets and convoys of these three northern maritime powers.

But the king's intention is merely to secure, by the above arrangements, the lawful commerce of his subjects, and not to cause any prejudice to the different powers at war, with whom he lives in perfect harmony, nor to favor any contraband dealings whatever; all the subjects of his majesty, who traffic by sea, or practise navigation, are hereby enjoined to observe the most exact neutrality, conformably to the laws of nature, and the rights and privileges of nations, almost universally acknowledged. But as the different treaties respecting the maritime commerce, which several powers have concluded among themselves, might create some difference in these rights and privileges, it is principally to the known declaration, which her majesty, the empress of Russia has caused to be presented, last year, to the belligerent powers, and to the ordinance which his majesty afterwards issued, on the 8th of March, 1780, for the regulation of her colleges of commerce, to which the subjects of the king are to conform, with regard to their maritime commerce; the principles set forth therein being such as his majesty finds the most coincident with the rights and privileges of nations in general, and with his own in particular.

In consequence thereof, it is ordered by this present edict, to all the Prussian subjects, who are in any ways concerned in the maritime commerce and navigation, as follows:

Art. I. That they shall not take any part, under what pretence soever, in the present war; and shall

not carry to any of the belligerent powers, under the Prussian flag, any goods or merchandise generally acknowledged as contraband, and which constitute implements or ammunition of war; such as cannons, mortars, flints, matches, gunpowder, salt-petre, pikes, sulphur, swords, and saddles. The subjects of the king shall also be cautious not to carry on board of their trading ships, any more of these articles than is absolutely necessary for their own use.

II. All Prussian subjects are, on the contrary, allowed and permitted to carry, under the Prussian flag, as well to the belligerent as to the neutral nations, all kinds of goods and merchandises which are not comprehended in the foregoing article, and which cannot properly be construed as implements or ammunitions of war, nor are hereby prohibited, but particularly allowed, all the productions of all the different provinces of his majesty's dominions. His majesty expects, from the equity and friendship of the belligerent powers, that they will not henceforth permit their ships of war, or privateers, to molest or seize any Prussian ships laden with masts, hemp, pitch, corn, and other materials, which, without being warlike stores, may however be converted into such, and which constitute the principal and almost only object of the Prussian commerce. These powers, it is hoped, are too just, to expect that the commerce of a neutral nation should be suspended, or entirely annihilated, on account of their broils and wars. After these principles, it is likewise hoped, that the different powers at war will henceforth let freely pass and repass, without seizing or confiscating, all lawful cargoes, goods, and merchandise, belonging to Prussian

subjects, and which may be laden on board of ships belonging to the subjects of any belligerent nations; and in the same manner, all lawful cargoes, goods, and merchandise, belonging to the subjects of any belligerent powers, and that may be laden on board of Prussian ships; "for, in all these cases, his majesty will most efficaciously interfere in favor of his subjects trading by sea."

But as it is prudent to avoid contestations as much as possible, his majesty most earnestly recommends to all his subjects, to endeavour, as much as can be, to load their goods and effects on board of Prussian ships, and always to carry the same under the Prussian flag; as also not to employ themselves, more than need be, in any coasting trade; but to adhere principally to the Prussian commerce only, in order to avoid the better all accidents, misunderstandings, and difficulties.

III. All Prussian ships, before they put to sea, shall provide themselves with proper passports and attestations from the admiralties, maritime colleges, or magistrates of the city or port from which they sail, as also with proper clearances, bills of lading, and other customary certificates, in which shall be expressed the quality and quantity of the cargo, the name of the proprietor, and the person to whom the goods are sent, as well as the name of the place for which the ship is destined. All these papers shall in every respect be clear and not equivocal. They shall always be kept on board, and shall not be thrown into the sea, under any pretext whatever. All captains or commanders of ships, are above all hereby for-

bidden to have on board of their ships any double, equivocal, or entirely false papers or passports; in which case, upon due conviction thereof, they shall not only be deprived of his majesty's protection, but also incur severe punishment.

IV. All Prussian ships, taking in any cargo in a foreign port, shall likewise provide themselves with the necessary passports and clearances, which are customarily granted to trading ships in that port, in order that they may prove every where of what nation they are, what their cargo consists of, from whence they came, and for what port they are bound; and if any pirate or other person should take the said papers from them by force, the king will consider it as an offence of the first magnitude.

V. No officers, or other persons employed in the navy of any of the belligerent nations, shall be taken as passengers, or otherwise be found on board of any Prussian ship; nor shall any more than one-third of the crew, consist of natives of any of these nations.

VI. All Prussian navigators are hereby strictly commanded, not to take any cargoes, goods, or merchandise whatever, to any fortified place or port, that may be besieged, blockaded, or surrounded by the ships of war of any of the belligerent powers.

VII. All Prussian navigators are likewise expressly forbidden to lend their names, papers, &c. to any other nation; for they are to carry on their trade in general in a manner conformable to the rights and customs of all nations, so that they may not occasion any prejudice to the rights of the belligerent powers, nor subject themselves to any reason of complaint.

All those of his majesty's subjects, who shall strictly conform to the tenor of this present edict, may rely on the king's most efficacious protection; but all those who shall neglect to conform thereto, shall not only be deprived of his protection, but may attribute to themselves all the dangers and damages which they may draw upon themselves, by a conduct contrary to the tenor of this present ordinance.

Given at Berlin, April 30, 1781.

By order of his majesty,

FINKENSTEIN,

E. F. DE HERTZBERG.

(Martens, tom. 4, p. 418.)

No. X.

Letter from Mr. Fox, to M. Simolin, dated March 29, 1782.

SIR,

HAVING laid before his majesty an extract of the letter, which you did me the honor, sir, of communicating from prince Gallitzin and Mons. de Marcoff, I have his majesty's commands to inform you, that the king, desirous of testifying his intentions towards their H. M. and of renewing their friendship which has been so unfortunately interrupted between old allies, who ought to be united in the bonds of mutual interest, is ready to enter into a negotiation, for the purpose of setting on foot a treaty of peace, on the terms and conditions of that which was agreed to, in 1674, between his majesty and the republic; and that the better to facilitate the execu-

tion of a plan which his majesty has so much at heart, the king is willing to give immediate orders for a suspension of hostilities, if, on their part, the lords, the states-general, should think such a measure suitable to the object in view.

I am commanded by his majesty to explain to you, sir, his sentiments on so important a subject, and desire you will impart the same to the ministers of her imperial majesty, to their H. M. that they may be conveyed, without the least delay, to the ministers of the republic; being of opinion, that it is the most convenient step, with the mediation and *good offices* of her imperial majesty, to put an end to the scourge of that war, which unfortunately subsists between the two nations.

I have the honor to be, &c.

C. J. FOX.

(An. Reg. for 1782, *p.* 299.*)*

No. XI.

A second letter from Mr. Fox to M. Simolin....dated St. James's, 4th May, 1782.

SIR,

I HAVE not at all delayed to lay before his majesty the communication, which you did me the honor of making to me the first of this month. His majesty has received it as a new mark of the friendship of her imperial majesty, and as a proof of the lively and sincere interest which she takes in the restoration of the peace of Great-Britain and her

[illegible]ly: I believe it will be needless to re-

mark to you, sir, that his majesty has understood, with the greatest satisfaction, that he has adjusted his councils in all points conformable to the measures which his majesty had already taken to second the good offices of the court of Petersburg. The king moreover promises himself, that her imperial majesty understands, with pleasure, that he has anticipitated her counsels, in having offered to the Hollanders the entire liberty of navigation, according to the treaty of 1674, between Great-Britain and the republic;....a treaty, by which the principles of the armed neutrality are established, in their widest extent, to all the contracting parties His majesty, then, does not make any difficulty to say, that he will accept, as the basis of a separate peace between him and the states-general, a free navigation, according to the principles demanded by her imperial majesty, in her declaration of the 26th of February, 1780.

You will permit me to remark, that, in communicating to you the sentiments of his majesty, I believe I need not repeat what I had the honor to write to you by his majesty's orders, on the 29th of March last. If that letter has not produced the effects, which her imperial majesty seems to have promised would be the effect of such a step towards a reconciliation, and on which alone, according to the report of the ministers of her imperial majesty at the Hague, the republic made the negociation for a peace with Great-Britain to depend; and if, notwithstanding the moderation which his majesty has taken pains to prove on this occasion, in terms the least equivocal,....the republic shall persist to oppose

every idea of a separate peace; the king will always have the satisfaction of having acted in such a manner, as to manifest the price he sets on the friendship of her imperial majesty, and the respect he has for her councils. I have the honor to be, &c.

C. J. Fox.

(New An. Reg. 1782, p. 150.)

No. XII.

Convention for the common defence of the liberty and safety of the Danish and Swedish commerce and navigation, between the king of Denmark and the king of Sweden, concluded at Copenhagen, March 27, 1794.

ART. 1. THEIR majesties declare solemnly, that they will maintain the most perfect neutrality in the course of the present war; avoid as much as on them depends, whatever may embroil them with the powers, their friends and allies; and continue to mark, as they have constantly done, in circumstances sometimes difficult, all the attention, and even all the amicable deference, consistent with their own dignity.

2. They declare, moreover, that they claim no advantage which is not clearly and unexceptionably founded on their respective treaties with the powers at war.

3. They engage also reciprocally, and before all Europe, that they will not claim, in cases not specified in their treaties, any advantage which is not

founded on the universal law of nations, hitherto acknowledged and respected by all the powers, and by all the sovereigns of Europe, and from which they can as little suppose that any of them will depart, as they are incapable of departing from it themselves.

4. Founding on a basis so just, the claim and the maintenance of their indisputable rights, they will give to the innocent navigation of their subjects, which is entirely within the rule of, and conformable to the subsisting treaties, without extending it to such as may depart from the rule, all the protection which it deserves against all those who, contrary to their expectation and their hopes, would disturb the legal exercise of sanctioned rights, the enjoyment of which cannot be denied to neutral and independent nations.

5. For attaining the proposed object, their majesties engage reciprocally to equip, as soon as the season will permit, each a squadron of eight ships of the line, with a proportionate number of frigates, and to provide them with all necessaries.

6. These squadrons shall unite or separate, as shall be judged best for the common interest, which shall be interpreted on both sides, with the amity that so happily subsists between the powers.

7. No distinction whatsoever shall be made between the interests and the flags of the two nations, except such as different subsisting treaties with other nations may require. Moreover, in all cases of defence, convoy or others, without any exception, the Danish ships shall defend the Swedish ships and

flag, as if they were their own nation, and the same on the other part.

8. For the order of command, in all cases it is agreed to adopt the tenor of the articles 6 and 7, in the convention of the 12th of July, 1756.

9. The German states, both of Denmark and Sweden, are reciprocally and entirely excepted from this convention.

10. The Baltic being always to be considered as a sea shut and inaccessible to the armed ships of distant powers at war, is declared so anew by the contracting parties, who are resolved to maintain in it the most perfect tranquillity.

11. Their majesties engage to make a joint communication of this convention to all the powers at war, adding the most solemn assurances of their sincere desire to preserve with them the most perfect harmony, and to cement, rather than wound it, by this measure, which tends only to secure rights maintained and asserted by those powers themselves, in all cases where they were neutral and at peace, without Denmark and Sweden having ever dreamt of interrupting them.

12. But if the unfortunate case should occur, that any power, in contempt of treaties and the universal law of nations, will not respect the basis of society and the general happiness, and shall molest the innocent navigation of the subjects of their Danish and Swedish majesties, then will they, after having exhausted all possible means of conciliation, and made the most pressing joint remonstrances, to obtain the satisfaction and indemnity due to them, make use of reprisals, at the latest, four months after the refusal

of their claim, wherever it shall be thought fitting, the Baltic always excepted; and will answer entirely the one for the other, and support one another equally, if either nation shall be attacked or injured on account of this convention.

13. This convention shall subsist in its whole tenor during the present war, unless it should be agreed upon, for the common interest, to make any useful or necessary change or addition to it.

Done at Copenhagen, this 27th of March, 1794.

(Signed) A. P. V. BERNSTORF,
ERIC MAGNUS STAEL, DE HOLSTEIN.

(An. Reg. 1794, *p.* 238.*)*

No. XIII.

Additional instructions to the commanders of his majesty's ships of war and privateers that have or may have letters of marque against France. Given at our court at St. James's, the 8th day of June, 1793, *and in the twenty-third year of our reign.*

(L. s.) George R.

1st. THAT it shall be lawful to stop and detain all vessels loaded wholly or in part with corn, flour, or meal, bound to any port in France, or any port occupied by the armies of France, and to send them to such ports as shall be most convenient; in order that such corn, meal, or flour, may be purchased on behalf of his majesty's government, and the ships be released after such purchase, and after a due allowance for freight, or that the masters of such ships, on

giving due security, to be approved of by the court of admiralty, be permitted to proceed to dispose of their cargoes of corn, meal, or flour, in the ports of any country in amity with his majesty.

2d. That it shall be lawful for the commanders of his majesty's ships of war and privateers, that have, or may have, letters of marque against France, to seize all ships, whatever be their cargoes, that shall be found attempting to enter any blockaded port, and to send the same for condemnation, together with their cargoes, except the ships of Denmark and Sweden, which shall only be prevented from entering on the first attempt, but on the second shall be sent in for condemnation likewise.

3d. That in case his majesty shall declare any port to be blockaded, the commanders of his majesty's ships of war and privateers, that have or may have letters of marque against France, are hereby enjoined, if they meet with ships at sea, which appear from their papers to be destined to such blockaded port, but to have sailed from the ports of their respective countries, before the declaration of the blockade shall have arrived there, to advertise them thereof, and to admonish them to go to other ports; but they are not to molest them afterwards, unless it shall appear, that they have continued their course with intent to enter the blockaded port, in which case they shall be subject to capture and condemnation, as shall likewise all ships wheresoever found, that shall appear to have sailed from their ports, bound to any port which his majesty shall have declared to be blockaded, after such declaration shall have been known in the country from which they

sailed, and all ships which in the course of the voyage shall have received notice of the blockade in any manner, and yet shall have pursued their course with intent to enter the same. G. R.

(Maxwell's Spirit of Marine Law, p. 418.)

No. XIV.

Additional instruction to the commanders of all our ships of war and privateers, that have or may have letters of marque against France. Given at our court at St. James's, the 6th day of November, 1793.

THAT they shall stop and detain all ships laden with goods, the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony, and shall bring the same, with their cargoes, to legal adjudication in our courts of admiralty. By his majesty's command,

HENRY DUNDAS.

(Rob. Adm. Rep. Vol. II. Appendix, No. 1.)

No. XV.

Instructions to the commanders of our ships of war and privateers, that have or may have letters of marque against France. Given at our court at St. James's, the 8th day of January, 1794.

WHEREAS, by our former instruction to the commanders of our ships of war and of privateers, dated the 6th day of November, 1793, we signified

that they should stop and detain all ships laden with goods the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony, and should bring the same with their cargoes to legal adjudication; we are pleased to revoke the said instruction, and in lieu thereof, we have thought fit to issue these our instructions, to be duly observed by the commanders of all our ships of war and privateers, that have or may have letters of marque against France.

1st. That they shall bring in for lawful adjudication, all vessels with their cargoes, that are loaded with goods the produce of the French West-India Islands, and coming directly from any port of the said islands, to any port in Europe.

2d. That they shall bring in for lawful adjudication all ships with their cargoes, that are laden with goods the produce of the said islands, the property of which goods shall belong to subjects of France, to whatsoever ports the same may be bound.

3d. That they shall seize all ships that shall be found attempting to enter any port of the said islands, that is or shall be blockaded by the arms of his majesty or his allies, and shall send them in with their cargoes for adjudication, according to the terms of the second article of the former instructions, bearing date the 8th day of June, 1793.

4th. That they shall seize all vessels laden wholly or in part with naval or military stores, bound to any port of the said islands, and shall send them into some convenient port belonging to his majesty, in order that they, together with their cargoes, may be

proceeded against according to the rules of the law of nations. By his majesty's command,

HENRY DUNDAS.

(2 Rob. Adm. Rep. Appendix, No. 2.)

No. XVI.

Instructions for the commanders of our ships of war and privateers, who have or may have letters of marque against France, Spain, or the United Provinces. Given at our court at St. James's, the 25th day of January, 1798.

WHEREAS, by our former instructions to the commanders of our ships of war and privateers, dated the 8th of January, 1794, we signified, that they should bring in for lawful adjudication, all vessels with their cargoes, that were laden with goods, the produce of the French West-India Islands, and coming directly from any port of the said islands to any port in Europe; and likewise all ships, with their cargoes, that were laden with goods, the produce of the said islands, the property of which goods should belong to subjects of France, to whatsoever ports the same might be bound; and that they should seize all ships that should be found attempting to enter any port of the said islands that was or should be blockaded by the arms of his majesty or his allies, and should send them in, with their cargoes, for adjudication; and also, all vessels laden wholly, or in part, with naval or military stores, bound to any port of the said islands, and should send them into some

convenient port belonging to his majesty, in order that they, together with their cargoes, might be proceeded against according to the law of nations. And whereas, in consideration of the present state of the commerce of this country, as well as that of neutral countries, it is expedient to revoke the said instructions; we are pleased hereby to revoke the same, and in lieu thereof, we have thought fit to issue these our instructions, to be observed from henceforth by the commanders of all our ships of war, and privateers that have or may have letters of marque against France, Spain, and the United Provinces.

I. That they shall bring in, for lawful adjudication, all vessels, with their cargoes, that are laden with goods, the produce of any island or settlement belonging to France, Spain, or the United Provinces, and coming directly from any port of the said islands or settlements, to any port in Europe, not being a port of this kingdom, nor a port of that country to which such ships, being neutral ships, shall belong.

II. That they shall bring in, for lawful adjudication, all ships, with their cargoes, that are laden with goods, the produce of the said islands or settlements, the property of which goods shall belong to subjects of France, Spain, or the United Provinces, to whatsover ports the same may be bound.

III. That they shall seize all ships that shall be found attempting to enter any port of the said islands or settlements, that is or shall be blockaded by the arms of his majesty; and shall send them in with their cargoes, for adjudication, according to the terms of the second article of the former instructions, bearing date the 8th day of June, 1793.

IV. That they shall seize all vessels laden wholly, or in part, with naval or military stores, bound to any port of the said islands or settlements, and shall send them into some convenient port belonging to his majesty, in order that they, together with their cargoes, may be proceeded against according to the rules of the law of nations. By his majesty's command, PORTLAND.

(2 Rob. Adm. Rep. Appendix, No. 3.)

No. XVII.

Instruction, 24th June, 1803.

IN consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war and privateers, not to seize any neutral vessel which shall be carrying on trade directly between the colonies of the enemy and the neutral country to which the vessel belongs, and laden with the property of inhabitants of such neutral country: Provided that such neutral vessel shall not be supplying, nor shall have on the outward voyage supplied, the enemy with any articles contraband of war, and shall not be trading with any blockaded port.

(5 Rob. Adm. Rep. Appendix, No. 1.)

No. XVIII.

Instruction, 1st February, 1805.

WHEREAS, we have judged it expedient that interruption should not be given to the supplying the

kingdom of Spain, in its present distress, with grain, notwithstanding the existing hostilities: We do hereby direct, and strictly enjoin the commanders of our ships of war and privateers, not to molest any neutral vessel laden solely with grain, and going to Spain, to whomsoever the said grain may belong, unless it be brought from, or be destined to, a blockaded port.

(5 Rob. Adm. Rep. Appendix, No. 2.).

No. XIX.

Convention between England and Russia, signed at St. Petersburg, the 5th (17th) June, 1801.

ART. I. THERE shall be hereafter between his imperial majesty of all the Russias, and his Britannic majesty, their subjects, the states and countries under their dominions, good and unalterable friendship and understanding; and all the political, commercial, and other relations of common utility between the respective subjects, shall subsist as formerly, without their being disturbed or troubled in any manner whatever.

II. His majesty the emperor, and his Britannic majesty declare, that they will take the most especial care of the execution of the prohibitions against the trade of contraband of their subjects with the enemies of each of the high contracting parties.

III. His imperial majesty of all the Russias, and his Britannic majesty, having resolved to place, under a sufficient safeguard, the freedom of commerce and navigation of their subjects, in case one of them shall be at war, whilst the other shall be neuter, have agreed:

1. That the ships of the neutral power shall navigate freely to the ports and upon the coasts of the nations at war.

2. That the effects embarked on board neutral ships, shall be free, with the exception of contraband of war, and of enemy's property; and it is agreed, not to comprise in the number of the latter, the merchandise of the produce, growth, or manufacture, of countries at war, which should have been acquired by the subjects of the neutral power, and should be transported for their account; which merchandise cannot be excepted in any case from the freedom granted to the flag of the said power.

3. That, in order to avoid all equivocation and misunderstanding, of what ought to be considered as contraband of war, his imperial majesty of all the Russias, and his Britannic majesty declare, conformably to the 11th article of the treaty of commerce, concluded between the two crowns, on the 10th(21st) February, 1797, that they acknowledge as such, only the following articles, viz. cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, firelocks, flints, matches, powder, salt-petre, sulphur, helmets, pikes, swords, sword-belts, pouches, saddles and bridles, excepting, however, the quantity of the said articles which may be necessary for the defence of the ship, and of those who compose the crew; and all other articles whatever, not enumerated here, shall not be reputed warlike and naval ammunition, nor be subject to confiscation, and of course shall pass freely, without being subject to the smallest difficulty, unless they be considered as ene-

my's property in the above settled sense. It is also agreed, that what is stipulated in the present article, shall not be to the prejudice of the particular stipulations of one or the other crown with other powers, by which objects of similar kind should be reserved, provided, or permitted.

4. That in order to determine what characterises a blockaded port, that denomination is given only to that where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering.

5. That the ships of the neutral power shall not be stopped but upon just causes and evident facts: that they be tried without delay, and that the proceeding be always uniform, prompt, and legal.

In order the better to ensure the respect due to these stipulations, dictated by the sincere desire of conciliating all interests, and to give a new proof of their loyalty and love of justice, the high contracting parties enter here into the most formal engagement, to renew the severest prohibitions to their captains, whether of ships of war or merchantmen, to take, keep, or conceal, on board their ships, any of the objects which, in the terms of the present convention, may be reputed contraband, and respectively to take care of the execution of the orders which they shall have published in their admiralties, and wherever it shall be necessary.

IV. The two high contracting parties, wishing to prevent all subject of dissension in future, by limiting the right of search of merchant-ships going under convoy, to the sole causes in which the belligerent

power may experience a real prejudice, by the abuse of the neutral flag, have agreed,

1. That the right of searching merchant-ships belonging to the subjects of one of the contracting powers, and navigating under convoy of a ship of war of the said power, shall only be exercised by ships of war of the belligerent party, and shall never extend to the fitters-out of privateers, or other vessels, which do not belong to the imperial or royal fleet of their majesties, but which their subjects shall have fitted out for war.

2. That the proprietors of all merchant-ships, belonging to the subjects of one of the contracting sovereigns, which shall be destined to sail under convoy of a ship of war, shall be required, before they receive their sailing orders, to produce to the commander of the convoy, their passports and certificates, or sea-letters, in the form annexed to the present treaty.

3. That when such ship of war, and every merchant-ship under convoy, shall be met with by a ship or ships of war of the other contracting party, who shall then be in a state of war, in order to avoid all disorder, they shall keep out of cannon-shot, unless the situation of the sea, or the place of meeting, render a nearer approach necessary; and the commander of the ship of the belligerent power shall send a boat on board the convoy, where they shall proceed reciprocally to the verification of the papers and certificates that are to prove, on one part, that the ship of war is authorised to take under its escort, such or such merchant-ships of its nation, laden with such a cargo, and for such a port; on the other part, that

the ship of war of the belligerent party belongs to the imperial or royal fleet of their majesties.

4. This verification being made, there shall be no pretence for any search, if the papers are found in due form, and if there exists no good motive for suspicion. In the contrary case, the captain of the neutral ship of war (being duly required thereto by the captain of the ship of war, or ships of war, of the belligerent power) is to bring to, and detain his convoy during the time necessary for the search of the ships which compose it, and he shall have the faculty of naming and delegating one or more officers to assist at the search of the said ships, which shall be done in his presence, on board each merchant-ship, conjointly with one or more officers selected by the captain of the ship of the belligerent party.

5. If it happen that the captain of the ship or ships of war of the power at war, having examined the papers found on board, and having interrogated the master and crew of the ship, shall see just and sufficient reason to detain the merchant-ship, in order to proceed to an ulterior search, he shall notify that intention to the captain of the convoy, who shall have the power to order an officer to remain on board the ship thus detained, and to assist at the examination of the cause of her detention. The merchant-ship shall be carried immediately to the nearest and most convenient port belonging to the belligerent power, and the ulterior search shall be carried on with all possible diligence.

V. It is also agreed, that if any merchant-ship thus convoyed should be detained without just and sufficient cause, the commander of the ship or ships of war

of the belligerent power, shall not only be bound to make to the owners of the ship and of the cargo, a full and perfect compensation for all the losses, expences, damages, and costs, occasioned by such a detention, but shall farther be liable to an ulterior punishment, for every act of violence or other fault which he may have committed, according as the nature of the case may require. On the other hand, no ship of war with a convoy shall be permitted, under any pretext whatsoever, to resist by force the detention of a merchant-ship or ships, by the ship or ships of war of the belligerent power; an obligation which the commander of a ship of war with convoy is not bound to observe towards privateers and their fitters-out.

VI. The high contracting powers shall give precise and efficacious orders, that the sentences upon prizes made at sea, shall be conformable with the rules of the most exact justice and equity; that they shall be given by judges above suspicion, and who shall not be interested in the matter. The government of the respective states shall take care that the said sentences shall be promptly and duly executed, according to the forms prescribed. In case of the unfounded detention, or other contravention of the regulations stipulated by the present treaty, the owners of such a ship and cargo shall be allowed damages proportioned to the loss occasioned by such detention. The rules to be observed for these damages, and for the case of unfounded detention, as also the principles to be followed for the purpose of accelerating the process, shall be the subject of additional articles, which the contracting parties agree to settle between

them, and which shall have the same force and validity as if they were inserted in the present act. For this purpose, their imperial and Britannic majesties mutually engage to put their hand to the salutary work, which may serve for the completion of these stipulations, and to communicate to each other without delay the views which may be suggested to them by their equal solicitude to prevent the least grounds for dispute in future.

VII. To obviate all the inconveniences which may arise from the bad faith of those who may avail themselves of the flag of a nation without belonging to it, it is agreed to establish for an inviolable rule, that any vessel whatever, to be considered as the property of the country the flag of which it carries, must have on board the captain of the ship, and one half of the crew of the people of that country, and the papers and passports in due and perfect form; but every vessel which shall not observe this rule, and which shall infringe the ordinances published on that head, shall lose all right to the protection of the contracting powers.

VIII. The principles and measures adopted by the present act, shall be alike applicable to all the maritime wars in which one of the two powers may be engaged whilst the other remains neutral. These stipulations shall in consequence be regarded as permanent, and shall serve for a constant rule to the contracting powers in matters of commerce and navigation.

IX. His majesty the king of Denmark, and his majesty the king of Sweden, shall be immediately invited by his imperial majesty, in the name of the two

contracting parties, to accede to the present convention, and at the same time to renew and confirm their respective treaties of commerce with his Britannic majesty; and his said majesty engages, by acts which shall have established that agreement, to render and restore to each of these powers, all the prizes that have been taken from them, as well as the territories and countries under their dominion, which have been conquered by the arms of his Britannic majesty since the rupture, in the state in which those possessions were found, at the period at which the troops of his Britannic majesty entered them. The orders of his said majesty, for the restitution of those prizes and conquests, shall be immediately expedited after the exchange of the ratification of the acts by which Sweden and Denmark shall accede to the present treaty.

X. The present convention shall be ratified by the two contracting parties, and the ratifications exchanged at St. Petersburg, in the space of two months at farthest, from the day of the signature. In faith of which, the respective plenipotentiaries have caused to be made two copies perfectly similar, signed with their hands, and have sealed them with their arms.

Done at St. Petersburg, the 5th (17th) June, 1801.

(L. S.) N. Count de Panin,

(L. S.) St. Helens.

(An. Reg. for 1801, *p.* 212, *&c.)*

No. XX.

First separate Article of the convention with the court of London, signed the 5th (17th) June, 1801.

THE pure and magnanimous intentions of his majesty the emperor of all the Russias, having already induced him to restore the vessels and goods of British subjects, which had been sequestered in Russia, his said majesty confirms that disposition in its whole extent; and his Britannic majesty engages also to give immediate orders for taking off all sequestration laid upon the Russian, Danish, and Swedish properties, detained in English ports, and to prove still more his sincere desire to terminate amicably the differences which have arisen between Great-Britain and the Northern courts; and in order that no new incident may throw obstacles in the way of this salutary work, his Britannic majesty binds himself to give orders to the commanders of his forces by land and sea, that the armistice now subsisting with the courts of Denmark and Sweden, shall be prolonged for a term of three months from the date of this day; and his majesty the emperor of all the Russias, guided by the same motives, undertakes, in the name of his allies, to have this armistice maintained during the said term.

Second separate Article.

THE differences and misunderstandings which subsisted between his majesty the emperor of all the Russias, and his majesty the king of the united kingdom of Great-Britain and Ireland, being thus termi-

nated, and the precautions taken by the present convention not giving farther room to fear that they may be able to disturb in future the harmony and good understanding which the two high contracting parties have at heart to consolidate, their said majesties confirm anew, by the present convention, the treaty of commerce of the 10th (21st) February, 1797, of which all the stipulations are here repeated, to be maintained in their whole extent.

Additional Articles to the same convention.

IT having been resolved, by the 5th article of the convention, concluded on the 17th June, 1801, between his imperial majesty of Russia and his British majesty, that both the high contracting powers should mutually agree upon certain separate articles for the establishing of those rules and principles, which are to be followed with a view to promote a speedy decision in respect to prizes made in the open sea, as well as with respect to the indemnification which is due to the proprietors of neutral ships and cargoes, in case of a groundless detention:— their majesties have for that purpose named and vested with full power, his imperial majesty of Russia, Alexander Prince Kurakin, his vice-chancellor, &c. and Victor count Kotschoubey, his actual privy counsellor, &c.; and his majesty the king of the united kingdom of Great-Britain and Ireland, Alleyne, lord baron St. Helens, peer of the said united kingdom, &c.; who, by virtue of their respective

full powers, have agreed upon the following articles:

ART. I. In case of a groundless detention, or other transgression of rules mutually established, there shall be paid to the owners of the ships so detained, and of their cargo, for each day's delay, a recompense in proportion to the loss sustained, reckoning according to the freight of the ship, and the quality of the cargo.

II. In case the ministers of the contracting parties, or other persons accredited by them, with the belligerent powers, shall happen to complain of the sentence given on such prizes by the respective courts of admiralty, the business shall be immediately referred by appeal, in Russia, to the directing senate, and in Great-Britain, to the king's council.

III. Both sides shall carefully examine whether the regulations and provisions in the present convention have been observed, which must be done in the speediest manner. Both contracting parties engage farther to adopt the most effectual means to prevent every unnecessary delay in respect to the sentences to be pronounced in the respective tribunals, on prizes made in the open sea.

IV. The effects detained shall neither be sold nor unloaded before a final sentence, unless in the case of a really pressing necessity, shewn to the court of admiralty, by a commission appointed for that purpose; and it shall by no means be permitted to the captors to unload of their own authority, or to carry away any thing from ships detained.

These separate articles, which form a part of the convention, signed on the 17th June, in the names of their imperial Russian, and Britannic majesties,

shall have the same force and effect as if they were word for word inserted in the said convention.

Signed at Moscow, October 20, 1801.

PRINCE KURAKIN,
COUNT KOTSCHOUBEY,
ST. HELENS.

Declaration explanatory of the second Section of the third Article of the same convention, signed at Moscow, the 8*th* (20*th*) *October*, 1801.

IN order to prevent any doubt or misunderstanding with regard to the contents of the second section of the third article of the convention, concluded the 5th (17th) June, 1801, between his Britannic majesty and his majesty the emperor of all the Russias, the said high contracting parties have agreed and declare, that the freedom of commerce and navigation, granted by the said article to the subjects of a neutral power, does not authorise them to carry, in time of war, the produce or merchandise of the colonies of the belligerent power, direct to the continental possessions, nor *vice versa*, from the mother-country to the enemy's colonies; but that the said subjects are however to enjoy the same advantages and facilities in this commerce as are enjoyed by the most favored nations, and especially by the United States of America.

Moscow, the 8*th* (20*th*) *of October*, 1801.

(L. S.) ST. HELENS,
(L. S.) LE PRINCE DE KURAKIN,
(L. S.) LE COMTE DE KOTSCHOTBEY.

(An. Reg. for 1801, *p.* 216, *&c.)*

No. XXI.

At the court of St. James's, the 19th of February, 1800, present, the king's most excellent majesty in council.

WHEREAS, by an act passed in the thirty-ninth year of his majesty's reign, intituled, "an act to allow the importation of Spanish wool in ships belonging to countries in amity with his majesty," reciting, that, by an act passed in the thirty-third year of his majesty's reign, to prevent traiterous correspondence with his majesty's enemies, and by several subsequent acts, trade and intercourse was prohibited between Great-Britain and the countries in hostility with his majesty, unless such trade and intercourse should be specially permitted by his majesty's licence and authority; and also reciting, that, for the encouragement of the manufactures of this country, it was expedient to permit the importation of Spanish wool from any place whatever in ships or vessels belonging to any kingdom or state in amity with his majesty, it was enacted, that it should be lawful to and for any person or persons to import into this kingdom Spanish wool from any port or place whatever, in foreign parts, in any ship or vessel belonging to any kingdom or state in amity with his majesty, any thing in the said act passed in the thirty-third year of the reign of his present majesty, or any other act or acts of parliament to the contrary in anywise notwithstanding.

And whereas, doubts have arisen, whether, according to the true construction of the said act of the thirty-ninth year of his majesty's reign, his ma-

jesty's subjects are thereby authorised to purchase and import Spanish wool under circumstances which would make the same liable to capture, as the property of subjects of his majesty trading with the enemy, unless the licence of his majesty should be first obtained for that purpose: His majesty, by and with the advice of his privy council, is pleased to order, and it is hereby ordered, that it shall be lawful for any of his majesty's subjects to purchase and import into this kingdom, any Spanish wool, in any ship or vessel belonging to any kingdom or state in amity with his majesty, notwithstanding the purchase and importation thereof may be deemed a trading with his majesty's enemies, and notwithstanding the same might be liable to capture as the property of his majesty's subjects trading with the enemy, in case this order had not been made.

And whereas some of his majesty's subjects may have already purchased for the purpose of importing into this kingdom, and others may have caused to be brought to this kingdom for the purpose of importation, Spanish wool, without having obtained his majesty's special licence for the same, conceiving that such licence had been rendered unnecessary by the said act of the thirty-ninth year of his majesty's reign, his majesty is pleased, by and with the advice of his privy council, to order, and it is hereby ordered, that in case any person or persons, being a subject or subjects of his majesty, hath, or have, since the passing of the said act, purchased, for the purpose of importing into this kingdom, or caused to be brought into this kingdom for the purpose of importation, any such Spanish wool as aforesaid,

without having previously obtained any special licence from his majesty for so doing; it shall be lawful for such person or persons to import the same, as if such licence had been previously obtained. And this his majesty's order shall be deemed and taken to be a full and sufficient licence for the purchase and importation of such wool, notwithstanding such purchase or importation might otherwise be deemed unlawful, as a trading with his majesty's enemies, in case this order had not been made. And the right ~~honorable~~ the lords commissioners of his majesty's treasury, and the lords commissioners of the admiralty, are to give the necessary directions herein, as to them may respectively appertain.

W. FAWKENER.

(2 Rob. Adm. Rep. Appendix, No. 7.)

END OF THE SECOND AND LAST VOLUME.

ERRATA.

VOL. I.

PAGE 9, line 4, *for* it *read* its.
57, note, l. 7, *for* dici *read* diei.
73, l. 1, *for* verse *read* reverse.
88, note, l. 3, for *Romanerum et imporatoribus*, read *Romanorum et imperatoribus.*
100, l. 10, *for* Spanish *read* Spaniards.
106, note, l. 21, for *hæredisbusque* read *hæridibusque.*
124, note, l. 3, for *utrumque* read *utcunque.*
144, note, l. 7, *for* conducted *read* behaved.
163, l. 8, *for* It *read* She.
169, l. 9, *dele* (.) *and insert* (?).
177, l. 9, *for* have *read* has.
183, note, l. 18, *for* has *read* have.
209, note, l. 4, *for* 1713 *read* 1613.
218, l. 3, *for* him *read* himself.
218, note, l. 1, *dele* that of *before* Gustavus.
296, l. 10, *for* them *read* wealth.
307, note, l. 3, *put* T. *at the end.*
311, l. 24, and 311, l. 4, for *scaccarii* read *saccarii.*
326, l. 16, *for* at *read* in.
328, note, l. 27, for *Robertson* read *Robinson.*
331, l. 4, *after* conduct *insert* himself.
354, l. 13, *for* which *read* that.
375, l. 17, *for* that city *read* Amalphi.
379, note, l. 18, *after* saying *insert* that.
409, last line, *dele* (.) *and insert* (;)—*for* In *read* in.

VOL. II.

5, note, l. 13, for *ignorant* read *ignorat.*
15, l. 7, *for* to avert from themselves *read* in guarding against.
15, l. 16, *after* attention *insert* on their part.
44, l. 18, *after* but *insert* is,
98, l. 11, *for* proach *read* reproach.
111, l. 7, *for* raise the siege *read* force the siege to be raised.
120, l. 17, for *Peren* read *Peur.*
204, l. 16, *for* loaded with powder, *read* without shot.
220, end of note, *insert* T.
269, l. 3, *for* memoirs *read* memorials.
281, note, l. 7, *after* happen, *insert* unless the prize has been conducted into a place of safety.
285, l. 12, *for* the captors, also, were, *read* was also.
316, l. 24, *for* to whom they paid the ransom, *read* from whom the ransom was made.

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